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JOURNAL OF THE MISSISSIPPI STATE BAR

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CONSTITUTIONAL DECISIONS DURING THE WAR YEARS

*George W. Stumberg**

Congressional Power

No discussion of the decisions of the Supreme Court of the United States in the field of constitutional law during the war years would be replete unless some preliminary reference were made to cases of an earlier date. It will be remembered that the years 1935-36 were disastrous ones for congressional legislation since it was during this period that the court held invalid the Railroad Retirement Act,[1] the National Industrial Recovery Act,[2] the Agricultural Adjustment Act,[3] and the Bituminous Coal Conservation Act.[4] While the stated constitutional objections revolved about delegation of legislative power, interstate commerce, or ability to tax one class of individuals for the benefit of another, undoubtedly an underlying moving force in the direction of unconstitutionality was judicial disapproval of resort by Congress to its power over interstate commerce and taxation in an effort to bring the economy of the United States within federal control.[5] The year 1937 saw, however, a change. In the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*[6] (decided that year) the court upheld the constitutionality of the National Labor Relations Act as applied to a

*Professor of Law, University of Texas; author, Stumberg, Conflict of Laws (1937) and various articles in legal periodicals.

[1]Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935). The decision was five to four. The dissenting view is now the law. *Cf.* U. S. v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208 (1939).

[2]Schechter Poultry Corp. v. U. S., 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935).

[3]U. S. v. Butler, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914 (1936).

[4]Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

[5]It might be noted that in three of the cases the court divided five to four or six to three. The strongest objection in the *Schechter* case was that inadequate limitations had been put on the executive in the formulation of codes. Congress in later legislation exercised better draftsmanship, for after 1936 no act of Congress was held invalid on grounds of nondelegability.

[6]301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352 (1937). See also, The Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); National Labor Relations Board v. Freuhauf Trailer Co., 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937); National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 S.Ct. 645, 81 L.Ed. 921 (1937); Washington, Virginia & M. Coach v. National Labor Relations Board, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965 (1937), upholding application of the act to various industries.

labor dispute in a Pennsylvania mill operated by a steel manufacturer whose activities in mining iron ore and coal, in distribution of finished steel and in transportation of ore, coal and steel by ships and barges extended beyond the confines of the State of Pennsylvania.

Under the act of Congress the National Labor Relations Board is authorized to prevent unfair labor practices *affecting commerce.* In answer to an argument that manufacturing is not commerce, the Court took the position that "although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions . . . Congress cannot be denied the power to exercise that control."[7] At the same term a majority of the Court saw no constitutional objection to the Social Security Act[8] in spite of its holding, only a year earlier, that the tax feature of the A.A.A. was unconstitutional.[9] Again, in 1941, the Fair Labor Standards Act was held to be constitutionally applicable to a Georgia manufacturer of lumber, a large portion of whose products found their way into interstate commerce.[10] In a decision in a companion case, handed down the same day, the administrative features of the act were sustained over the objections of manufacturers of textiles whose finished products go into interstate commerce.[11] Since then the inclusiveness of the Fair Labor Standards Act has been treated as primarily giving rise to a problem of statutory construction rather than to one of constitutional power.[12] The judicial attitude has been that Congress did not, in the Act, exhaust its constitutional power.[13] Therefore the application of the Act does not give rise to problems of power but of legislative intent within the power constitutionally exercised. So, whatever differences of judicial opinion there may have been from time to time during the past several years as to the particular employees coming

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[7]301 U.S. 1, 37.

[8]Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293 (1937); Helvering v. Davis. 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319 (1937).

[9]U. S. v. Butler, *supra* note 3. A difference between the two acts is that under A.A.A. the proceeds of the processing tax were earmarked and paid directly to farmers. Under Social Security they go into the general fund from which equivalent withdrawals are made. Four of the justices who went to make up the majority in the Butler case dissented in the Social Security cases.

[10]United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430 (1941). The "child labor" cases were expressly overruled.

[11]Opp Cotton Mills, Inc., et al. v. Administrator of Wage and Hour Division of Department of Labor, 312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624 (1941).

[12]*Cf.* Mr. Justice Frankfurter in 10 East 40th Street Bldg. v. Callus, 325 U.S. 578, 65 S.Ct. 1227, 89 L.Ed. 1806 (1945). See also Kirschbaum Co. v. Walling, 316 U.S. 517, 62 S.Ct. 1116, 86 L.Ed. 1638 (1942).

[13]See cases cited *supra* note 12.

within its scope, and they have been frequent,[14] the differences have not, in the main, been on constitutional grounds.[15] However, some of the decisions, even though they profess to involve problems of statutory construction, also illustrate the extent to which Congress may now go in regulating matters which may formerly have been regarded as having been reserved to the states.

In the case of *Kirschbaum Co. v. Walling*,[16] for example, the Fair Labor Standards Act was held to be applicable to maintenance employees in factory lofts where clothing is produced for interstate commerce. Likewise maintenance workers in an office building owned by and largely occupied by a corporation engaged in interstate commerce have been held to be within its scope,[17] as have been auxiliary firefighters employed by a soap manufacturer doing an interstate business.[18] Along somewhat similar lines, in early 1945 the law was applied to home piece workers producing garments a part of which went into interstate commerce[19] and in *Fitzgerald Construction Co. v. Pedersen*[20] the term "engaged in interstate commerce" was construed to include employees of a construction company under contract to repair railroad bridges all of which were in a single state. But liberal interpretation and so indirect recognition of broad congressional power to control matters of economic or social concern has not been confined to the Fair Labor Standards Act. The National Labor Relations Act has, for example, been so construed as to include alleged unfair labor practices of a fraternal benefit society whose business extends across state lines.[21] In addition, the

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[14]For example, Mr. Justice Roberts dissented in the Kirschbaum case, *supra* note 12. Mr. Chief Justice Stone dissented in Borden Co. v. Borella, *infra* note 17. The decision in 10 East 40th Street Bldg. v. Callus *supra* note 12, was five to four. The majority held the act as a matter of statutory construction to be inapplicable to maintenance workers in an ordinary office building.

[15]It should be noted that the words used in the different recent Acts of Congress are not the same. For example, the Fair Labor Standards Act speaks in terms of employees "engaged in (interstate) commerce or the production of goods for (interstate) commerce." The Labor Relations Act authorizes the Board to prevent unfair labor practices "affecting commerce." Compare the Federal Employers' Liability Act as amended in 1939, 53 STAT. 1404, 45 U.S.C.A. § 15 (1939): "Any employee of a carrier any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce." Obviously the coverage of the three acts is not always necessarily the same. Consequently cases in which one is interpreted are not necessarily controlling where the others are before the Court. The cases cited in the ensuing notes are not exhaustive insofar as coverage of the Fair Labor Standards Act is concerned. See Davisson, *Coverage of the Fair Labor Standards Act* (1945) 43 MICH. L. REV. 867.

[16]316 U.S. 517, 62 S.Ct. 1116, 86 L.Ed. 1638 (1942).

[17]Borden v. Borella, 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865 (1945).

[18]Armour & Co. v. Wantock, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944).

[19]U. S. v. Rosenwasser, 323 U.S. 360, 65 S.Ct. 295, 89 L.Ed. 301 (1945).

[20]324 U.S. 720, 65 S.Ct. 892, 89 L.Ed. 1316 (1945).

[21]Polish National Alliance of the United States v. National Labor Relations Board, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944).

Supreme Court has recently held that activities of those engaged in collecting and purveying news,[22] are subject to the provisions of the Sherman Act as are those engaged in the insurance business.[23]

As has already been stated the reaction of a majority of the Court against Congressional legislation during the 1935-36 period was, while not necessarily so expressed, in part based on disapproval of national control of the economy of the country. Most lawyers will recall that during the period falling between the two world wars the members of the Supreme Court were sharply, at times bitterly,[24] divided into opposing camps over the issue of due process as a limitation on legislative power where the objective of particular legislation was social or economic. Liberty of contract and individual economic freedom were concepts to which frequent resort was had to strike down state or national legislation.[25] Since 1936 no federal legislation has been declared invalid because of a due process theory of economic liberty immune from governmental control.[26] Not only have the general objectives of Social Security, Fair Wages and Hours, and Protection Against Unfair Labor Practices been able to withstand attacks on alleged grounds of denial of due process,[27] but there are other instances where the Court has sustained governmental interference with economic freedom. In some the intervention went much further in restricting the individual than would have been thought to be possible a dozen years ago.

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[22]Associated Press v. U. S., 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). *Cf.* The Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937) sustaining a cease and desist order of the National Labor Relations Board against the Associated Press.

[23]U. S. v. South-Eastern Underwriters Association, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

[24]See, for examples, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330 (1937) (sustaining minimum wage and overruling a prior decision reaching a contrary result); Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923) (holding invalid a Kansas "set-up" calling for compulsory arbitration of labor disputes); Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934) (upholding price fixing for milk); Ribnik v. McBride, 277 U.S. 350, 48 S.Ct. 545, 72 L.Ed. 913, 56 A.L.R. 1327 (1928) (denying constitutionality to a state statute regulating prices charged by employment agencies). *Contra:* Olsen v. Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305, 133 A.L.R. 1500 (1941). See also New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (holding invalid an Oklahoma statute requiring a certificate of public convenience to engage in the business of manufacturing ice).

[25]*Cf.* New State Ice Co. v. Liebmann, Ribnik v. McBride, both *supra* note 24, and cases cited *supra* notes 1, 3 and 4.

[26]It is not meant here that due process would not be applied so as to prevent a direct taking of property by the government. *Cf.* U.S. v. Causby, —— U.S. ——, 66 S.Ct. 1062, 90 L.Ed. 971 (1946), holding that flights in take-offs and landings by government planes can constitute a "taking" under the fifth amendment and so must be compensated.

[27]See cases cited *supra* notes 6-11.

The decision of the Supreme Court in *Wickard v. Filburn*[28] is an example. In 1939, in the case of *Mulford v. Smith*,[29] the Court sustained the marketing quota penalty provisions of Title III of the Agricultural Adjustment Act of 1938[30] as applied to tobacco sold above the pre-established quota. The position was that the act "sets no limit upon the acreage which may be planted or produced . . . It reaches and effects at the throat where tobacco enters the stream of commerce, the marketing warehouse."[31] In the *Filburn* case[32] the plaintiff sought an injunction to restrain the enforcement against himself of a marketing penalty upon that portion of his wheat crop "available" for marketing in excess of the quota for his farm. It had been his practice to sow a small acreage in wheat. A portion of the crop, under this practice, was sold and the remainder used on the farm to feed poultry and livestock (some of which were sold) and for domestic purposes. The allotment of wheat acreage was, in 1941, established at 11.1 acres. He, however, planted 23 acres and harvested an excess of 239 bushels which, so it was contended, was subject to a penalty of 49 cents a bushel. Enforcement of the penalty was sustained. This time Mr. Justice Jackson speaking for the full court said, "whether the subject of the regulation in question was 'production,' 'consumption' or 'marketing' is . . . not material."[33] While the record did not show what Filburn intended to do with his excess production it can be assumed from the decision that not only may Congress adopt under its power over commerce measures having as their purpose control of production, but that such control does not violate the fifth amendment even though production is not for immediate sale of the fruits in the original form, or, apparently, even though it is for home consumption. Except for a limited class of instances, the assumption before 1937 was that due process prohibited governmental price fixing. Now there seems to be no limitation on legislative substantive power in this respect.[34] Since free production and sale on a free market have

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[28]317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

[29]307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092 (1939).

[30]52 STAT. 45, 7 U.S.C.A. § 1311.

[31]307 U.S. 38, 47.

[32]Cited *supra* note 28.

[33]317 U.S. 111, 124. The opinion contains an excellent account of the cases beginning with *Gibbons v. Ogden* decided in 1824.

[34]See Yakus v. U.S., 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (sustaining the Emergency Price Control Act. Congressional power was sustained as a war measure but price fixing can be related also to interstate commerce); Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944) (sustaining rent control); U.S. v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939) (milk); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940) (coal); Federal Power Commission v. Natural Gas Pipe Line Co., 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942) (natural gas). *Cf.* U.S. v. Wrightwood Dairy Co., 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942), upholding regulation of the price of milk produced and sold in a state. In Nebbia v. New

long been assumed to be cornerstones of a free economy, it is difficult to see what legislative restraints may not be imposed by Congress.

In practically all of the instances which have been given as illustrations of the current broad expanse of congressional power over the economic life of the country the mechanical operations of the legislative objectives were placed by Congress in the hands of administrative bodies.[35] In two cases, decided during the 1935-36 period, congressional legislation[36] was struck down because the authority delegated by Congress was not confined within sufficiently limited "canals" to operate as controls over the exercise of administrative discretion.[37] This was the case with the N.I.R.A.[38] The codes established under the broad powers given the executive were denied constitutionality in the *Schechter* case[39] in part because of a theory that Congress had established no standard for presidential action. Delegation of power to the President to prohibit transportation of illegally produced oil in interstate commerce met the same fate in *Panama Refining Co. v. Ryan.*[40] However, since the 1935-36 period, no case has held an act of congress unconstitutional because of conflict with theories of nondelegability of broad authority. The reasons are, perhaps, twofold. Congress has not delegated authority in as broad terms as it did in the instances just mentioned.[41] More important, the

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York, cited *supra* note 24, the power of New York to fix milk prices was upheld in a five to four decision as an exceptional exercise of state power. In Sunshine Anthracite Coal Co. v. Adkins, *supra,* price control was treated as a matter of legislative economic policy.

[35]*Cf.* The Fair Labor Standards Act, The Agricultural Adjustment Act as amended, and the National Labor Relations Act. They could not very well fulfill their functions unless the details of their workings were left to administrative bodies. The same would be true, for example, of price fixing by the O.P.A.

[36]Schechter Poultry Corp. v. U.S., 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935).

[37]*Cf.* U.S. v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911); J. W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928). See also the dissenting opinion of Mr. Justice Cardozo in the *Ryan* case and his concurring opinion in the *Schechter case,* both *supra* note 36.

[38]Section 3 of the National Industrial Recovery Act, 48 STAT. 195, 196 (1933), 15 U.S.C. § 703, permitted the President to approve codes of fair competition upon application by representatives of trades or industries. He could also prescribe codes on his own initiative. *Cf.* the concurring opinion of Mr. Justice Cardozo in the *Schechter* case, *supra* note 36, in which he said: "This is delegation running riot." He, however, dissented in the *Ryan* case, cited *supra* note 36.

[39]Cited *supra* note 36.

[40]Cited *supra* note 36. Cardozo, J. dissented.

[41]While opinions may differ none of the delegation in the later Congressional Acts appears to the writer to be as loose as that in the N.I.R.A. with respect to codes or even as in Title I, 48 STAT. 195, 200 (1933), 15 U.S.C. Tit. I, § 709 (C) empowering the President to act with respect to the transportation of hot oil. The standards are, however, expressed in general terms which are much broader than that involved in such cases as J. W. Hampton, Jr. & Co. v. U.S., cited note 37 *supra.*

Court has not looked upon congressional delegation with as unkindly an eye.[42]

To summarize, the lawyer who expects to have an act of Congress declared unconstitutional by the Supreme Court because of alleged remoteness from congressional authority over interstate commerce, or because of former theories of economic due process, or because of a thesis of nondelegability of legislative functions can have little, if any, hope of seeing his expectations fulfilled. In sum, whether we like it or not, congressional action with respect to social and economic matters has ceased to give rise to legal-constitutional questions; so the only effective area of debate, aside from the meaning to be given a law, is that of legislative expediency. The *locale* of that debate is a legislative chamber and not a courtroom.

Power of the States

Due Process

While "due process," whether resort is to the fifth or fourteenth amendment, no longer appears to be a potent instrumentality for striking down legislation because of its economic or social objective, the scope of the fourteenth amendment as a protective cover for such liberties of the mind as freedom of assembly, freedom of the press, freedom of speech and religious freedom has been enlarged during recent years. Here protection of claims specifically recognized in the Bill of Rights has been read into due process as a limitation on state action.[43] In addition, the Court has on different occasions reexamined doctrines of due process as applied to criminal trials.

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[42]The more liberal point of view of Mr. Justice Cardozo as expressed in the *Ryan* case, cited note 36 *supra,* has probably become "sub silentio" the guiding star of the Court. For a relatively recent discussion of delegation, see Yakus v. U.S., *supra* note 34, in which the Court divided as to the administrative features of the Price Control Act.

[43]In Barron v. Mayor of Baltimore, 7 Pet. 243 (U.S. 1833), the Supreme Court settled the point that the first eight amendments are limitations on federal action only. There are decisions to the effect that the "bill of rights" has not as such been brought into the Constitution as limitations on state action as the result of the adoption of the fourteenth amendment. *Cf.* Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908) (self incrimination); Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884) (indictment by grand jury); Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900) (modification of common-law jury of twelve). Where, as in the cases discussed at this point, equivalents of the express limitations on the federal government are drawn into the scope of the fourteenth amendment, it is believed to be on a thesis that the fourteenth amendment requires a minimum of fair play in criminal trials. Reading into the fourteenth amendment freedom of worship, freedom of the press, freedom of assembly and freedom of speech is on a thesis that these liberties are a part of our hard won democratic heritage. It could, of course, be argued that there is no valid reason to distinguish between personal and economic freedoms. Obviously the pace set in 1937 makes the argument futile.

The criminal cases are too numerous for all to be dealt with in detail. A few illustrations should suffice to indicate the extent to which the Supreme Court has read into "due process" its concepts of fair play when life or liberty is at stake. In the prewar Scottsboro case[44] the Court held that the right of counsel is one of the incidents of a fair trial. The doctrine was reaffirmed in 1945 in two capital cases from Missouri.[45] However, in *Betts v. Brady*[46] it was held not to be a denial of due process to refuse to appoint counsel when the offense charged, although a felony, is not capital. It will be recalled that in *Brown v. Mississippi*[47] a conviction of murder allegedly obtained through torture was reversed. Two cases, *Ward v. Texas*[48] and *Malinski v. New York*,[49] should serve as illustrations of extensions of the doctrine of forced confessions as originally applied in the Mississippi case. In the Texas case the defendant was illegally arrested, moved about from county jail to county jail and told of threats of mob violence, which apparently did not exist. In addition he was continuously questioned. The use of his confession obtained under these circumstances was held to be a denial of due process. In the New York case the defendant upon his arrest was taken to a hotel room where he was stripped and not permitted for several hours to put on his clothes. He was refused permission to see a lawyer or any friends other than one who was charged as a participant in the same crime. He confessed after being so held from 8 A.M. to 6 P.M. Questioning was only occasional. Even so, conviction was reversed. As a further recent illustration of application of the doctrine that due process requires a fair and impartial trial reference should also be made to the case of *Pyle v. Kansas*[50] in which it was stated that use of perjured testimony by the State with knowledge of the perjury constitutes a denial of due process.[51]

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[44]Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527 (1932).

[45]Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945) and Tompkins v. Missouri, 323 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407 (1945).

[46]316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942). The right to counsel under the Sixth amendment seems to be broader than due process. *Cf.* Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

[47]297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936).

[48]316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942).

[49]324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945).

[50]317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942).

[51]Does due process or equal protection, when trial is by jury, require a jury drawn from a cross section of the community? *Cf.* Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Thiel v. Southern Pac. Co., —— U.S. ——, 66 S.Ct. 984, 90 L.Ed. 922 (1946). In 1945 it was held that due process and equal protection do not require that negroes be represented on grand juries in a proportion based upon the ratio of their numbers to the entire population of the community. Akins v. Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945). *Cf.* Hill v. Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942). As to negroes on trial juries see Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074

Activities of Jehovah Witnesses have been responsible for more than their share of cases involving freedoms of the mind.[52] In the pre-war case of *Cantwell v. Connecticut*,[53] for example, Newton Cantwell and others were convicted of violating a Connecticut statute prohibiting solicitation of money for alleged religious, charitable, or philanthropic causes without approval of the Secretary of Public Welfare. The conviction was affirmed by the Connecticut Supreme Court of Errors. The facts were that the defendants, on the day of the arrest, were engaged in going singly from house to house on Cassius Street in New Haven. About ninety per cent of the residents of Cassius Street are Roman Catholics. The defendants were each armed with books and pamphlets on religious subjects, a phonograph and a set of records, one of which contained an attack on Catholicism. Individuals interviewed were asked for permission to play a record describing a book. If permission was granted they were asked to buy the book described in the record. Also, contributions were solicited. The Supreme Court of the United States reversed on the ground that the activities of the defendants were protected by the fourteenth amendment which, so it was held, by implication prohibits state action interfering with free speech and religious freedom.

A number of subsequent cases have involved balancing claims based on asserted freedom of speech or religious freedom against other claims. On the whole, the scales have been heavily weighted in favor of freedom of worship and of speech but not without sharp differences of opinion. At times the Court has seemed to give insufficient weight to other traditional claims. For example, in the case of *West Virginia State Board of Education v. Barnette*[54] a majority of the court found it to be unconstitutional for a state to attempt to compel children in public schools to salute the flag and make or give a pledge of allegiance, in spite of the fact that three years earlier a contrary result had been reached under similar circumstances.[55] In the earlier decision the conclusion had been

(1935). Ordinarily where there has been a denial of criminal justice the remedy is by way of appeal to the Supreme Court. Exceptionally habeas corpus will lie. In any event state remedies must be exhausted. *Cf. Ex parte* Hawk 321 U.S. 114, 64 S.Ct. 488, 88 L.Ed. 572 (1944).

[52]See Howerton, *Jehovah's Witnesses and the Federal Constitution* (1946) 17 Miss. L. J. 347.

[53]310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352 (1940). It should be noted that the defendants were also convicted for inciting a breach of the peace. As to this conviction the court said, "We find only an effort to persuade (another) to buy a book or contribute money."

[54]319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674 (1943). See also Taylor v. Mississippi, 319 U.S. 583, 63 S.Ct. 1200, 87 L.Ed. 1600 (1943) denying validity to a statute making it unlawful to urge others not to salute the flag.

[55]Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375, 127 A.L.R. 1493 (1940).

that the individual claim to religious freedom must give way to what was then thought to be the superior claim of the state, namely the right to require in its schools an outward demonstration of patriotism.[56] Again, in the case of *Jones v. Opelika,*[57] the Court, sharply divided, sustained a municipal ordinance exacting a fee for the privilege of distributing and selling religious tracts on the public streets. But the decision was short-lived, since a year later the judgment was vacated[58] because of intervening decisions which were thought by a majority of the Court to be inconsistent.[59]

There are, however, isolated cases where the Court has not sustained claims based on religious freedom. In the case of *Cox v. New Hampshire,*[60] for example, conviction was affirmed in a prosecution under an ordinance prohibiting a parade or procession on the public streets without a permit and in *Prince v. Massachusetts*[61] a statute prohibiting sales in public streets was upheld as applied to children assisting their parents in distributing religious tracts. Public interest in promoting traffic convenience and its protection and legitimate concern for the welfare of children outweighed individual claims to immunity on religious grounds. But, as an indication of the extent to which the Court may go in protecting claims to individual or personal liberties reference might be made here to the result reached in the recent case of *Marsh v. Alabama.*[62] There a Witness of Jehovah, while distributing pamphlets on a side-walk in a company-owned town in Alabama, was requested to leave the premises. Conviction in the state courts under a statute making criminal her refusal to leave private property upon request was reversed by the Supreme Court. Mr. Justice Reed along with the late Chief Justice Stone and Mr. Justice Burton dissented from a doctrine that "one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an essential right to spread his religious

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[56]See dissenting opinion of Mr. Justice Frankfurter in the *Barnette* case, cited *supra* note 54.

[57]316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691 (1942).

[58]319 U.S. 105, 63 S.Ct. 891, 87 L.Ed. 1292 (1943).

[59]*Cf.* Follet v. Town of McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944). See also Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed 873 (1943). In the last two cases Texas ordinances either prohibited distribution of religious handbills or required a permit to do so. They were held invalid. By way of contrast, an ordinance prohibiting distribution of commercial handbills was sustained in Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942).

[60]312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396 (1941).

[61]321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

[62]326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 227 (1946). See also Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 235 (1946), where the same result was reached, but the town was owned and controlled by the U.S. government.

views." The decision seems to cut close to the right to privacy of the owner or of others on privately owned property, a right which would seem to be as fundamental a liberty as that involved in proselyting in favor of a particular religious belief.[63]

During the earlier World War and in the years intervening between the two struggles, a debatable ground was the extent to which federal and state governments can go in making advocacy of particular political philosophies, such as communism or syndicalism, criminal.[64] Perhaps, insofar as state action is concerned, the best expression of what came to be the view of the Supreme Court is to be found in *De Jonge v. Oregon*.[65] The case was one involving the ability of a state to prosecute a communist who had helped organize and had attended a meeting advertised as a protest against raids on workers' homes and halls. At the meeting the defendant, as a member of the party, criticized the activities of the local police as well as other local matters. During the course of the opinion, reversing conviction below, it was said, "The holding of meetings for political action cannot be proscribed. . . . The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose, not as to the relations of the speakers but whether the utterances transcend the bounds of the freedom of speech which the constitution protects."[66] While freedom of speech and of assembly were brought within the protective coverage of the fourteenth amendment they were not regarded as absolutes.[67]

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[63] *Cf.* Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) in which constitutionality was denied an ordinance prohibiting ringing of doorbells by Jehovah Witnesses.

[64] *Cf.* Schenk v. U.S., 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919); Abrams v. U.S., 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919); Schaefer v. U.S., 251 U.S. 466, 40 S.Ct. 259, 64 L.Ed. 360 (1920). Convictions had been obtained for violations of the Espionage Act. Convictions were affirmed in all three cases. In the *Schenk* case affirmance was by a unanimous court. Mr. Justice Holmes, however, wrote a dissenting opinion in the *Abrams* case and Mr. Justice Brandeis wrote a dissenting opinion in the *Schaefer* case.

Cases involving state prosecutions include Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), sustaining conviction under the California Criminal Syndicalism Act; Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927), reversing conviction under a similar Kansas Statute because of the insufficiency of the evidence before the trial court; Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484 (1931), reversing conviction under a California statute making it criminal to display a red flag as a symbol or emblem of opposition to organized government.

[65] 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937).

[66] 299 U.S. 353, 365. The position of Mr. Justice Hughes was that advocacy of the overthrow of government by force or advocacy of some other criminal act could be punished, but not attendance at a peaceful protest meeting.

[67] See the dissent of Mr. Justice Holmes in the *Abrams* case, cited *supra* note 64, which, so it is believed, more than anything said by any other judge formed the basis of the current doctrine of freedom of speech.

Shortly before Pearl Harbor, in the case of *Thornhill v. Alabama*,[68] resort was had to the thesis of the *De Jonge* case to strike down an Alabama statute prohibiting peaceful picketing. There, the court speaking through Mr. Justice Murphy said, "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of punishment." The privilege of freedom of expression has been frequently given operative effect during the past five years not only in situations involving peaceful picketing but also so as to assure opportunity for expression in other respects in labor matters.[69] However, freedom of discussion is not absolute. Picketing must be peaceful and an injunction may issue if the place picketed has "no nexus" with the labor dispute.[70] Attention should also be called at this point to the fact that the Supreme Court quite recently restricted the power of a state court[71] to punish for contempt when based upon editorial comment and even cartoons relating to the administration of criminal justice. Here again the freedom is not absolute since the position was

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[68]310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

[69]See National Labor Relations Board v. Ford Motor Co., 114 F. (2d) 905 (C.C.A. 6th, 1940), *cert. denied,* 312 U.S. 689, 61 S.Ct. 621, 85 L.Ed. 1126 (1941), holding that dissemination of information concerning the facts of a labor dispute is a privilege which belongs to the employer as well as to the employee. In American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941), an injunction was denied even though there was no immediate employer-employee dispute. An attempt was being made to unionize a place of business. *Cf.* Bakery and Pastry Drivers v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178 (1942).

See also Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), involving a Texas statute requiring an identification card from union organizers soliciting membership. The statute was held to be inapplicable to a union official who made a speech in which he urged his listeners to join his union. The decision was five to four. The dissent took the position that while a state cannot prohibit a speech by a union official in favor of a labor union or take action against advocating "one's fellows" to join, it can require identification (as long as there is no discrimination) as a condition for solicitation of membership. In Hill v. Florida, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945), a somewhat similar statute (requiring a license from a business agent of a union) was held to be inconsistent with the National Labor Relations Act.

[70]*Cf.* Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200 (1941). Picketing had been accompanied by violence. The state court enjoined all picketing, not merely violence. A majority of the Supreme Court affirmed because of a thesis of a survival of fear engendered by past violence. The dissent thought the injunction should have been limited to violence. However, isolated instances of abuse have been held not to justify an injunction. Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58 (1943).

In Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942), one Ritter let a contract for the construction of a building. The contractor employed nonunion labor. The union picketed Ritter's Cafe which had no connection with the building. An injunction by the state courts was affirmed.

[71]Pennekamp v. Florida, —— U.S. ——, 66 S.Ct. 1029, 90 L.Ed. 1001 (1946). *Cf.* Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), denying power to enjoin as a nuisance an alleged "defamatory" paper; Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 443, 80 L.Ed. 660 (1936), holding invalid a gross receipts tax on newspapers.

that punishment may not be inflicted where it does not appear that the *comment gave rise to clear and present danger* to local administration of justice.[72]

Interstate Commerce

Throughout a large part of our constitutional history there has been considerable difference of opinion as to the effect of the commerce clause as a limitation on state legislative power in the absence of Congressional legislation covering the same subject matter. The difference was latent in *Gibbons v. Ogden*[73] and in *Brown v. Maryland,*[74] but vociferous in such cases as *Cooley v. Port Wardens of Philadelphia,*[75] upholding state pilotage laws, in *Leisy v. Hardin,*[76] denying to the states the power to apply their local prohibition laws to liquor in the original package, and in *Di Santo v. Pennsylvania,*[77] holding unconstitutional a state statute requiring agencies selling steamship tickets to procure a local license. General statements such as "undue burden on interstate commerce," "direct effect on commerce," or the "need for uniformity of regulation" as against such expressions as "a matter of local concern" or "indirect effect" were resorted to as reasons for denying or granting validity to state laws. Until comparatively recently the judicial tendency seemed to be in the direction of confining permissible exercise of state power within narrow limits. The present tendency is, with reservations, decidedly in the other direction. The *Di Santo* case was, for example, overruled in *California v. Thompson,*[78] decided in 1941. In 1943 the Supreme Court upheld an order of the Illinois Public Utilities Commission requiring freight trains made up of cars being switched across the Mississippi at St. Louis from Illinois to Missouri to carry cabooses.[79] Again, but earlier, a sales tax imposed upon the buyer was sustained as applied to coal sent into New York from Pennsylvania

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[72]The influence of the philosophy of Mr. Justice Holmes on the results reached in these later cases has indeed been remarkable. In his dissent in the *Abrams* case, cited note 64 *supra,* involving a manifesto or call for stoppage of work on war material, he placed as a limit on freedom of speech the imminent danger that what is said will bring about an evil that can be prevented. Proximity of the danger of injury to person or government was the criterion set by him in measuring power of the government to intervene.

[73]9 Wheat. 1, 6 L.Ed. 23 (U.S. 1824).

[74]12 Wheat. 419, 6 L.Ed. 678 (U.S. 1827).

[75]12 How. 299, 13 L.Ed. 996 (U.S. 1851).

[76]135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1890). The decision was by a vote of five to four.

[77]273 U.S. 34, 47 S.Ct. 267, 71 L.Ed. 524 (1927). The decision was five to four. It was overruled in California v. Thompson, 313 U. S. 109, 61 S.Ct. 930, 85 L.Ed. 1219 (1941).

[78]See note 77 *supra.*

[79]Terminal R.R. Association v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 (1943).

under a contract of sale consummated in New York.[80] On the other hand, in *McLeod v. Dilworth*[81] valid effect was denied an Arkansas sales tax as applied to sales consummated in Tennessee for the ultimate delivery of goods in Arkansas, with, however, technical delivery made in Tennessee and title passing there. Again, in 1945, an Arizona statute limiting passenger trains to fourteen cars and freight trains to seventy was held to be invalid.[82] More recently the Court denied validity to a Virginia statute providing for racial segregation of passengers on interstate buses.[82a]

Insofar as the disruptive effect on interstate commerce is concerned it is difficult to see, if each stood alone, any appreciable difference between the New York and Arkansas taxes.[83] Except for the degree of disturbance of interstate commerce the same might even be said for the Illinois regulation requiring a freight train to carry a caboose and the Arizona regulation limiting the number of cars in a train.[84] The only approximate rationalization of the apparently conflicting results is that while the strictures imposed by the majority in the *Di Santo* case no longer have support among any of the members of the Court there has been a shift in the area of debate. Mr. Justice Black, for example, seems to have taken the position that the matter of state legislation affecting interstate commerce is primarily one for congressional and not judicial control, except possibly where the state legislation is discriminatory. Consequently the Court should normally abstain from denying effect to local laws, unless, of course, Congress has spoken.[85] By way of contrast the late Chief Justice Stone regarded the matter, when state power to tax was

[80]McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876 (1940). Mr. Chief Justice Hughes dissented. *Cf.* Nelson v. Sears Roebuck Co., 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888 (1941); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488 (1939), sustaining state taxes on somewhat similar facts.

[81]322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944). See also Gwin, White & Prince v. Henneford, 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272 (1939), holding unconstitutional a business activity tax as applied to a resident distributor of fruit doing business throughout the United States. Mr. Justice Black wrote a dissenting opinion.

[82]Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945).

[82a]Morgan v. Virginia, —— U.S. ——, 66 S.Ct. 1050, 90 L.Ed. 982 (1946).

[83]Justices Douglas, Black, Murphy, and Rutledge dissented in the *McLeod* case, cited note 81 *supra*. Perhaps the unexpressed but underlying reason for the position of the majority was that if the Arkansas tax had been sustained the simple transaction would have been taxable by both Arkansas and Tennessee. As a consequence the interstate transaction would be subject to double taxation and so at a disadvantage as compared with a local one.

[84]Mr. Justice Black and Mr. Justice Douglas dissented in separate opinions in the *Arizona* case, cited note 82 *supra*.

[85]See dissenting opinions of Mr. Justice Black in the case of Southern Pacific Co. v. Arizona, cited note 82 *supra*, and in Guinn, White & Prince v. Henneford, cited note 81 *supra*. He also joined in the dissent in the McLeod case, cited note 81 *supra*.

involved, as one for judicial determination with, however, the decision revolving about the likelihood of the tax placing commerce at a competitive disadvantage. If the state tax does no more than place an interstate transaction on the same plane as a local one, the mere fact that interstate commerce is involved does not make it invalid.[86] Somewhat the same idea underlay his philosophy when other state regulatory measures were involved since apparently in this field the balance would not be according to "need for uniformity" or "direct and indirect burden" but from the point of view of the disruptive effect of the local regulation on national claims. This effect would be determined by actual examination of the facts and not by resort to hypothetical values. In the Arizona case the interest of the state was slight as compared with the claims of the nation as a whole. In the Illinois case the effect on interstate operation of trains was slight, since the requirement of cabooses affected only a small segment of traffic. Also a duty was imposed with respect to train operations which if Illinois had been denied power could not have been, by the same token, regulated by Missouri. The Virginia interstate bus case can perhaps be explained on the basis of antipathy to racial discrimination.

In its early history, state prohibition ran the risk of becoming partially ineffective because of impediments to enforcement arising out of decisions of the Supreme Court to the effect that liquor in the original package and originating from a point without the state could not be subjected to local law.[87] Congress sought to assist the states by enacting the Wilson and Webb-Kenyon acts the purpose of which was to bring liquor originating in wet territory within control of the laws of a dry state upon arrival there or upon shipment into such a state. Both acts were upheld by the Supreme Court.[88] In 1936 a similar attitude was taken with respect to a congressional act making shipments of convict produced goods into a state subject to its laws upon arrival or delivery.[89] A number of more recent cases have upheld the authority of a state to tax in what might otherwise be a prohibited field upon a theory of Congressional consent.[90] Again, during the current year, the Supreme Court sustained a state tax on a foreign insurance company on the basis of the

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[86]See McGoldrick v. Berwin-White Coal Mining Co., cited note 80 *supra*.

[87]*Cf.* Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1890).

[88]*In re* Rahrer, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572 (1891); Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917).

[89]Whitfield v. Ohio, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778 (1936). *Cf.* Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270 (1937).

[90]*Cf.* International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 109 (1945), and cases therein cited by Chief Justice Stone; Superior Bath House Co. v. McCorrol, 312 U.S. 176, 61 S.Ct. 503, 85 L.Ed. 721 (1941).

McCarran Act[91] which authorized state taxation and regulation of the insurance business after it had been declared to come within the Sherman Act.[92]

It has been intimated and even held that there are limitations on Congressional power to consent to the exercise of state power in otherwise prohibited areas.[93] Recent judicial extension of the scope of permissible state action affecting commerce diminishes by that much the need for Congressional consent. Should the point of view of Mr. Justice Black ultimately prevail there would be no occasion for consent, since the state could ordinarily act without it. In any event there is little likelihood that Congress will give its consent to state interference where the matter is of national concern. So as a practical matter there is little chance that Congressional power to consent will be denied.

Full Faith and Credit

There remains for discussion a further important area of constitutional limitation on freedom of state action, namely, Full Faith and Credit.[94] In most of the recent decisions the Court has reached, if not necessarily the expected result, at least one which is not startling. Most state courts have, for example, held that domicil within a state confers jurisdiction on the courts there to render a judgment *in personam*. In 1940 it was concluded that a judgment entered against a resident who has been served with process while temporarily out of the state is entitled to full faith and credit.[95] A year later in the case of *Riley v. New York Trust Co.*[96] the position was taken that an adjudication as to the

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[91]Prudential Insurance Co. v. Benjamin, —— U.S. ——, 66 S.Ct. 1142, 90 L.Ed. 1023 (1946).

[92]U.S. v. South-Eastern Underwriters Association, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

[93]*Cf.* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145 (1920); Washington v. Dawson & Co., 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646 (1924). In these cases a majority of the court concluded that Congress could not bring injuries to maritime shore workers incurred on navigable water within the scope of state compensation laws. The Congressional acts were enacted as the result of the decision in Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A. 1918C 451, Ann. Cas. 1917E 900 (1917) to the effect that state compensation laws cannot be applied to maritime injuries. The situation was ultimately taken care of by enacting a general federal compensation law for maritime workers. However, it is believed that if the question of state and federal power arose initially today, the cases would be differently decided since in the Jensen and other related cases the decisions were five to four and the philosophy of the dissenters more nearly approaches the present philosophy of the court.

[94]U. S. CONST. Art IV, § 1.

[95]Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

[96]315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885 (1942). In a situation involving administration of assets of a decedent the court determines questions of title to property. Usually the domiciliary administrator has primary authority to administer all the

domicil of a decedent in proceedings involving administration of an estate is only conclusive as to property located in the state of adjudication, since the proceedings have only *in rem* effect. In 1943 it was held that an administrative award of workmen's compensation precludes resort by the claimant to the courts or administrative boards of other states.[97] Earlier decisions, while not decisive of the exact issues in the foregoing instances, established precedents on which reasonable expectancies of the results actually reached could be based.

The same cannot be said, however, of two decisions (both involving the same facts) in which the Supreme Court dealt with full faith and credit in connection with divorce. Forty years ago in the case of *Haddock v. Haddock*[98] the Supreme Court of the United States speaking through then Mr. Justice White delineated the circumstances under which a divorce decree is entitled to full faith and credit. Under the doctrines which were then announced divorces which are entitled to full faith and credit comprise those granted at the domicil of one of the spouses if service has been had on the other or if he has appeared, those granted *ex parte* at the domicil of both spouses and those granted *ex parte* at the matrimonial domicil. The views expressed by Mr. Justice White did not, however, prohibit state courts from giving, if they wished, local effect to decrees granted *ex parte* at the domicil of one of the spouses even though that domicil might not be the matrimonial domicil or the domicil of the other spouse. The effect of the decision was to deny to states having strict rules as to recognition of foreign divorces authority to deny local effect to decrees granted under the enumerated circumstances. A majority by far of the state courts, following earlier case authority, continued to recognize the effectiveness of *ex parte* divorces granted at the domicil of one of the spouses.[99] In a few states, however, in large part because of local policy with respect to divorce, the courts denied full faith and credit unless the foreign decree came within one of the three categories

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assets of the estate irrespective of their location. If, however, the assets are in another state, adjudication as to those assets is, as long as the courts of the other state so insist, ineffective, even though an incidental question of domicil may be involved. In connection with power over a *res,* while not necessarily a decision as to full faith and credit by state courts, the case of Huren Holding Corp. v. Mine Operating Company, 312 U.S. 183, 61 S.Ct. 513, 85 L.Ed. 725 (1941) is interesting in that it locates a judgment debt at the place where the debtor may be reached by legal process. *Cf.* Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905).

[97]Magnolia Petroleum Co. v. Hunt, 321 U.S. 801, 64 S.Ct. 483, 88 L.Ed. 1088 (1944). *Cf.* Brodrick v. Rosner, 294 U.S. 629, 55 S.Ct. 589, 79 L.Ed. 1100 (1935), accord as to administrative assessment of a stockholder's liability. For the background of interplay of state compensation acts see Alaska Packers' Association v. Industrial Accident Commission, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1935).

[98]201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann. Cas. 1 (1906).

[99]See STUMBERG, CONFLICT OF LAWS (1937) 268 *et seq.*

just mentioned, in which case recognition was compulsory under the decision in the *Haddock* case. North Carolina is one of these states.

In May of 1940 Mrs. Hendrix and O. B. Williams (both married at the time) left North Carolina to go to Las Vegas, Nevada, where after a short sojourn each secured a divorce from his or her former spouse. They were then married in Nevada from where they returned to North Carolina. Upon arrival in the latter state they were charged with bigamy. Both relied on the Nevada decrees and the marriage in that state. The position of the prosecution was that under prior decisions the Nevada decree was not entitled to full faith and credit in North Carolina since it had not been granted at the matrimonial domicil. The State Supreme Court agreed. However, the Supreme Court of the United States[100] reversed, stating specifically that earlier cases, such as *Haddock v. Haddock,* were overruled.

Upon a new trial the prosecution took the position that the defendants had not, in any event, acquired domicils in Nevada and so the divorces, granted without service in Nevada on the North Carolina respondents, were ineffective. The jury and state courts agreed and the defendants were convicted. This time conviction was affirmed by the Supreme Court,[101] but the Court divided sharply. A variety of views were expressed by the dissenting justices which if they were to prevail would mean that a divorce, even though *ex parte,* granted under circumstances where the connection of the petitioners with the decree granting state is something less than domicil would be entitled to full faith and credit. The view taken by the majority means that an *ex parte* divorce granted at the domicil of one of the spouses is entitled to full faith but the matter of domicil in fact may be gone into *de novo* elsewhere if the validity of the divorce is questioned. To the extent that matrimonial domicil was eliminated as a jurisdictional factor, state power to refuse full faith and credit to a divorce granted in another state was curtailed. If any one of the dissenting views had prevailed state power would have been further curtailed. The extent to which it should be curtailed is, of course, a matter of opinion. Inasmuch as a divorce is granted on grounds permitted at the forum, it is believed that the state of the domicil of the spouses, or at least the state of the domicil when the marital relations factually came to an end has a predominant interest in the marriage. Therefore jurisdiction to divorce *ex parte* should be confined to the courts of that state. Certainly to base jurisdiction to di-

[100]Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942).
[101]Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945). See also Esenwein v. Pennsylvania, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608 (1945).

vorce on anything less than domicil of at least one of the spouses would encourage migratory divorces by couples who for one reason or another cannot obtain divorces at home but who are unwilling to give up their connection with the state where they reside.[102]

Suffrage

Ultimate power to control the time, place and manner of holding Congressional elections rests in Congress. Subject to the restrictions of the fifteenth and nineteenth amendments qualifications of voters are matters within state control since those who may vote are those who are qualified electors for the most numerous branch of the state legislature.[103] However, by implication those who are so qualified have a constitutional right to vote in a congressional election. The recent case of *United States v. Classic*[104] involved a question as to whether a qualified voter has a constitutional right to vote not only in a congressional election but in a primary in which a party candidate for Congress is selected. The defendants were charged under an Act of Congress with conspiracy to injure and oppress citizens in the exercise of a constitutional right, namely the right to cast their ballots in a primary election and to have them properly counted. The Supreme Court sustained the charge. The decision not only removed all lingering doubts as to the power of Congress to legislate, within its sphere, with respect to congressional primaries[105] but it also led to a reversal of position as to the constitutionality of excluding, by party action, negroes from the Texas Democratic primary. Originally exclusion was by state law. This was held to be unconstitutional, not under the fifteenth amendment but as a denial of equal protection.[106] An attempt to delegate by statute to the state executive committee authority to exclude met the same fate.[107] But voluntary party

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[102]The problem of the migratory divorce is discussed in Stumberg, *Jurisdiction to Divorce* (1946) 24 Tex. L. Rev. 119. In the second Williams case Mr. Justice Murphy concurred in the result writing a separate opinion. Mr. Justice Rutledge dissented on the ground that the domicil concept is vague and confusing. He would, apparently, substitute a stay or sojourn for some definite period of time. Mr. Justice Black, who also dissented, would apparently allow jurisdiction to divorce on something less than a protracted sojourn or stay. He was struck by the unfairness of holding the defendants as bigamists after their intermarriage in Nevada, which marriage was apparently valid in that state. Mr. Justice Douglas joined in this dissent. His particular point of view is expressed in an opinion in the *Esenwein* case, cited *supra* note 101.

[103]U. S. Const. Art. I, §§ 1 and 4.

[104]313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). The dissent was not on constitutional grounds but on questions relating to statutory construction.

[105]*Cf.* Newberry v. U.S., 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913 (1921).

[106]Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927).

[107]Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458 (1932).

exclusion was upheld.[108] However, in the case of *Smith v. Allwright*[109] the Court took the position that the Democratic primary was so closely identified with the local election machinery that party exclusion of a negro would violate the fifteenth amendment. The two cases just discussed do not necessarily mean, however, that a state may not prescribe generally the qualifications for voters in state elections and so, indirectly, for voters in Congressional elections.[110] Nor do they mean that the courts will interfere when some political question such as local congressional redistricting is involved.[111]

Intergovernmental Immunities

One of the by-products of *McCullough v. Maryland*[112] was extension over a period of more than a century of the scope of the thesis of intergovernmental immunities so that it came to be a nebulous, as well as at times an artificial barrier against imposition of taxes by either a state or the United States upon activities relating to the functions of the other government. As a result of the decision in *Collector v. Day*[113] salaries of state or federal employees were, for example, formerly exempt from federal or state income taxes. Also, certain types of transactions between individuals and state governments could not be taxed by the federal government, or where between individuals and the federal government, by the states. *Collector v. Day* has been overruled. As a consequence salaries of both state and federal employees are now subject to federal and state income taxes.[114] A further consequence of overruling *Collector v. Day* has been a reexamination of former doctrines of intergovernmental immunities in other respects. The lines have been narrowed so as to reduce materially the forbidden zone of state or federal taxation affecting federal or state activities.

In *Alabama v. King and Boozer,*[115] for example, the Court upheld a state sales tax on the purchase of building materials used in a cost-plus

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[108]Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680 (1935).

[109]321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

[110]*Cf.* Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627 (U.S. 1875), holding (prior to the nineteenth amendment) that women have no right to vote unless permitted to do so by state law. See also Breedlove v. Suttles, 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252 (1937), upholding a Georgia statute requiring payment of a poll tax as a suffrage qualification.

[111]*Cf.* Colegrove v. Green, —— U.S. ——, 66 S.Ct. 1198, 90 L.Ed. 1242 (1946).

[112]4 Wheat. 316, 4 L.Ed. 579 (U.S. 1819).

[113]11 Wall. 113, 20 L.Ed. 122 (U.S. 1871).

[114]See Helvering v. Gerhardt, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927, 120 A.L.R. 1466 (1939); State Tax Commission of Utah v. Van Cott, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950 (1939).

[115]314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941).

contract with the federal government, thus overruling prior decisions to the contrary. More recently the Court sustained a state tax on land, technical title to which was in the United States.[116] However, a purchaser was in possession under an executory contract of sale. At the same time it has been held that machinery belonging to the United States but used under lease in carrying out a war contract is immune from state property taxes.[117] Here beneficial ownership in the government seems to have been the deciding factor.

Several recent cases have involved the power of Congress to withdraw from state taxation activities of federal agencies which might otherwise be taxable. The power of Congress in this respect has been sustained.[118] A question has also been raised as to whether immunity of a state activity from federal taxation should be narrower in scope than the immunity of the federal government and its agencies. In *New York v. United States,*[119] where the question was one of the ability of the federal government to tax sales of mineral waters produced from springs owned by a state, Mr. Justice Frankfurter took the position that the immunity of state activities is more limited than that of federal activities, presumably because the states, having representation in Congress, can get a political hearing while the federal government having no representation in state legislative bodies has no opportunity for political relief. Therefore the courts should be more zealous in protecting federal agencies against state action. It was agreed by a majority of the Court in the New York case that the federal government could tax, but disagreement as to reasons was such as to make it difficult to predict the future course of decisions where other state activities are drawn in question.[120] It has, however, been held that the United States can regulate state operation of wharves,[121] and the position has been taken that the Price Control Act is applicable to sales by a state or one of its political subdivisions.[122] Had the situation been reversed, namely, had the issues been with respect

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[116]S.R.A. v. Minnesota, — U.S. —, 66 S.Ct. 749, 90 L.Ed. 663 (1946).

[117]U.S. v. Allegheny County, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944).

[118]*Cf.* Federal Land Bank v. Bismark Lumber Co., 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941); Maricopa County v. Valley National Bank, 318 U.S. 357, 63 S.Ct. 587, 87 L.Ed. 834 (1943). Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 60 S.Ct. 15, 84 L.Ed. 11, 124 A.L.R. 1263 (1939).

[119]New York v. U.S., 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 265 (1946).

[120]Two justices dissented expressing concern over protection of the states. Mr. Justice Frankfurter, with whom Mr. Justice Rutledge concurred, stressed the ability of the states to protect themselves politically in Congress. The position of Mr. Chief Justice Stone was that the court should look to see whether the particular activity is one which if not taxed would withdraw taxable items from the federal power to tax.

[121]California v. U.S., 320 U.S. 577, 64 S.Ct. 352, 88 L.Ed. 322 (1944).

[122]Case v. Bowles, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 398 (1946) (sale of state owned timber); Hulbert v. Twin Falls County, 327 U.S. 103, 66 S.Ct. 444, 90 L.Ed. 404 (1946) (sale of machinery by a county).

to the power of the states to regulate similar activities of the federal government without congressional consent, it is at least doubtful whether the results would have been the same. While there have been decisions during the past several years permitting non-discriminatory regulations or taxation of individuals transacting business with the United States government, those decisions do not deal with the power of a state to regulate or tax directly activities of the United States.[123] On the whole the evidence from the meagre decisions is that immunity of state activities from federal regulation or taxation is more limited than federal immunity from state action in these respects. However, the governing principles have not been settled.

Conclusion

There are several general matters concerning the activities of the Supreme Court which might be mentioned in conclusion. The opinions of Holmes, Brandeis, Cardozo and Stone of ten to twenty-five years ago are the foundation on which current constitutional doctrines have been built. But the Court during the past ten years has moved on to new areas of debate. While all the members now agree when the issue is one of congressional power over commerce or of economic due process, they frequently disagree as to the content to be given congressional legislation. Disagreement in the field of state legislation affecting interstate commerce continues to exist even though former restrictions on state power in this respect have been in part eliminated. Much the same might be said for due-process protection of personal freedoms and for intergovernmental immunities. Some of the Court seem to tend to look upon each case as an isolated one. Also, there has been an increasing tendency on the part of members of the Court to write separate concurring opinions whether they happen to be with the majority or the minority. Furthermore the Court as a whole has felt freer than ever before from the restraining hand of precedent. Although on the whole federal or state action is now much less susceptible to successful attack

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[123] *Cf.* Johnson v. Maryland, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920). Maryland denied power to require a driver's license of a driver of a postal truck; Mayo v. U.S., 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504, 147 A.L.R. 761 (1943). State inspection law invalid as applied to fertilizer used by U.S. in soil conservation program. But see Penn Dairies, Inc. v. Milk Control Commission, 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943) to the effect that a state may control the price of milk when sold to the army; *cf.* Pacific Coast Dairy, Inc. v. Department of Agriculture of California, 318 U.S. 285, 63 S.Ct. 628, 87 L.Ed. 761 (1943), reaching a different result where milk was sold to the quartermaster of Moffett Field in California. The cases seem irreconcilable but were reconciled by those who were of the majority in each. Neither involves, however, state power to tax or regulate where the business is that of the United States.

on constitutional grounds than was formerly the case, individual differences within the Court in the fields where strictures continue to exist, in old or new forms, are such that prediction is no less difficult, when the scope of these strictures is in issue, than was formerly the case at a time when the strictures were broader in scope. To this extent the position of the lawyer in advising a client is still a precarious one.

SCOPE OF THE FEDERAL EMPLOYERS' LIABILITY ACT—RECENT DEVELOPMENTS

*Samuel P. Delisi**

Since the turn of the century, legal relief for industrial accidents to workers on interstate railroads, because of its distinctive development, has been the subject of considerable comment and research.[1] In this as in other fields,[2] railroad employees are accorded distinctive treatment. They constitute one of the few groups of industrial labor working without the benefit of a comprehensive system of workmen's compensation[3] covering all accidental disability incurred in the course of their employment.[4] Statistically, the importance of the subject is readily demonstrated. For the years 1935-39, in the course of 2,454 million man-hours of work per year, accidents inflicted on railroad employees a yearly average of 655 deaths

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[1]For discussions of the subject of this article, see Schoene and Watson, *Workmen's Compensation on Interstate Railways* (1934) 47 HARV. L. REV. 389; Gellhorn, *Federal Workmen's Compensation for Transportation Employees* (1934) 43 YALE L.J. 906; Albertsworth and Cilella, *A Proposed "New Deal" for Interstate Railway Industrial Harms* (1934) 28 ILL. L. REV. 587, 774; Clark, *Workmen's Compensation and the Railroads: a Hesitating Revolution* (1933) 41 J. POL. ECON. 806; Note (1932) 42 YALE L.J. 226; THORNTON, FEDERAL EMPLOYERS' LIABILITY ACT (3d ed. 1916); ROBERTS, INJURIES TO INTERSTATE EMPLOYEES ON RAILROADS (1915); Notes (1921) 10 A.L.R. 1184, (1921) 14 A.L.R. 732, (1923) 24 A.L.R. 634, (1924) 29 A.L.R. 1207, (1927) 49 A.L.R. 1339, (1930) 65 A.L.R. 613, (1932) 77 A.L.R. 1374, (1934) 90 A.L.R. 846. See also notes 26, 28, 32, 120 *infra*.

[2]Social security is provided for railroad workers in statutes relating solely to railroads. Railroad Retirement Act of June 24, 1937, 50 STAT. 307 (1937), 45 U.S.C. §§ 228a-228s (1940); Carriers Taxing Act of June 29, 1937, 50 STAT. 435 (1937), 45 U.S.C. §§ 261-273 (1940). Labor relations on the railroads revolve about the Railway Labor Act of May 20, 1926, 44 STAT. 577 (1926), as amended by the Act of June 21, 1934, 48 STAT. 1185 (1934), 45 U.S.C. §§ 151-163 (1940).

[3]The coverage of the compensation acts is by no means all-inclusive. Agricultural workers, for example, are generally excluded, even though farm processes are becoming highly mechanized. See *Problems of Workmen's Compensation Administration,* U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, Bull. No. 672 (1940) 32-45.

[4]All the states except Mississippi now have systems of workmen's compensation for occupational disabilities. See note 11 *infra*. Mississippi, however, has modified the common law principles applying to actions of negligence by servant against master. Thus, a statutory rule of comparative negligence now obtains. MISS. CODE ANN. (1942) § 1454. But contributory negligence is no defense in any action against a railroad for injuries caused by a "flying" switch or by backing a train into a passenger station without observing certain conditions. *Id.* §§ 7770, 7771. In actions of negligence by employees, assumption of risk is abolished in any case where injury or death results in whole or in part from the negligence of the master, except as to conductors or locomotive engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. *Id.* § 1456. And the fellow servant rule has been made unavailable as applied to railroad employees. *Id.* § 7806; MISS. CONST. Art. 7, § 193. See Keady, *Workmen's Compensation for Mississippi: One View* (1945) 17 MISS. L.J. 197; Lee, *Workmen's Compensation for Mississippi: Another View* (1945) 17 MISS. L.J. 202.

and 18,912 injuries causing disabilities of more than three days.[5] During the years of the war emergency from 1940 to 1944, hauling unprecedented volumes of freight and passengers under abnormal operating conditions, the roads experienced an increase in accidents involving employees and, more importantly, an expectable rise in casualty frequency. The rate per million man-hours for the period 1940-44 rose over the previous five-year period from 0.267 to 0.285 for deaths and from 7.71 to 10.49 for injuries.[6] This same period of war stress saw judicial implementation of legislative changes made in 1939 in the adjustment of accidental disabilities and deaths of employees on the railways, one phase of which will be examined in this article.

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The subject to be here considered centers on a close study of the Federal Employers' Liability Act.[7] The FELA and state compensation statutes are said to be mutually exclusive.[8] This means that the remedy for injuries or deaths suffered by railroad employees in interstate commerce is to be found exclusively in the Federal Act, while injuries or deaths incurred in intrastate commerce come within the local law. Thus, the jurisdictional problem for litigants in each case is to determine when relief must be sought under the FELA and when under the workmen's compensation law of the state.

Passed in haste in 1908 after judicial invalidation of the First Employers' Liability Act,[9] the original statute remained untouched in its essentials for over 31 years.[10] It imposed liability on every common carrier by railroad engaged in interstate commerce for injury or death to any employee "while . . . employed in such commerce" resulting from the carrier's negligence. By abolishing the fellow servant rule, instituting a rule of comparative negligence, partially limiting assumption of risk, and outlawing any contract exempting the carrier from liability, the FELA was thought to be a liberal step forward in adjusting the accident risk of

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[5]Accident Bull. No. 113 (I.C.C. 1944) Table 16, p.6.

[6]*Ibid.*

[7]Act of April 22, 1908, 35 Stat. 65 (1909), 45 U.S.C. §§ 51-59 (1940) as amended by the Act of April 5, 1910, 36 Stat. 291 (1910), 45 U.S.C. §§ 56, 59 (1940) and the Act of August 11, 1939, 53 Stat. 1404 (1939), 45 U.S.C. §§ 51, 54, 56, 60 (1940).

[8]New York Cent. R.R. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045 (1917).

[9]34 Stat. 232 (1906). This Act imposed upon "every common carrier" operating in interstate commerce liability for damages "to any of its employees" resulting from its negligence. It was declared unconstitutional in the Employers' Liability Cases, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297 (1908).

[10]The 1910 amendment, cited in note 7 *supra*, provided for the survival of actions in the event of the death of the injured employee.

industrial activity among employers, workers, and the public. But as workmen's compensation acts providing relief for accidental injuries without regard to negligence were passed in increasing numbers by the state legislatures in the decade following passage of the FELA,[11] the coverage of the Federal statute became of critical importance in no-fault cases. In *New York Cent. R. R. v. Winfield*,[12] the Supreme Court held that Congress, by enacting the FELA, had fully covered compensation to railroad employees for injuries suffered in interstate commerce and left no room for state regulation, even in respect to injuries occurring without negligence, as to which the Federal Act provided no remedy. In other words, if at the time of the accident the employee was engaged in interstate commerce, he could not recover workmen's compensation under a state act, but had his sole remedy under the FELA, even though this remedy might be valueless because of lack of proof of negligence.

Despite the remedial gap created by the *Winfield* case with the consequence that the worker alone bears the cost of no-fault injuries suffered in interstate commerce, the Act has remained in effect throughout the years. Added to the delay incident to the adjustment of unfixed liability under a statute such as the FELA was the risk of determining the applicable jurisdiction in doubtful cases. In close situations the carrier defendant, faced with large verdicts from sympathetic juries, naturally asserted the non-existence of federal jurisdiction.[13] On the other hand, in no-fault cases the employee understandably sought state relief under the compensation acts and denied that his right of recovery lay in the Federal Act. Moreover, current political and economic philosophies conceived that the burden of industrial disabilities ought to fall not on the worker but on the employer and ultimately on the public as one of the costs of production. In this social atmosphere, the courts likely have tended to-

[11]The 47 states having compensation laws enacted them in the following order in the years stated: ten in 1911—Washington, Kansas, Nevada, New Jersey, California, New Hampshire, Wisconsin, Illinois, Ohio, Massachusetts; three in 1912—Michigan, Rhode Island, Arizona; eight in 1913—West Virginia, Oregon, Texas, Iowa, Nebraska, Minnesota, Connecticut, New York; two in 1914—Maryland, Louisiana; eight in 1915—Wyoming, Indiana, Montana, Oklahoma, Vermont, Maine, Colorado, Pennsylvania; one in 1916—Kentucky; five in 1917—South Dakota, New Mexico, Utah, Idaho, Delaware; one in 1918—Virginia; three in 1919—North Dakota, Tennessee, Alabama; one in 1920—Georgia; one in 1925—Missouri; one in 1929—North Carolina; two in 1935—Florida, South Carolina; and one in 1939—Arkansas. Thus 41 of the 47 state acts were passed in the decade 1910-19. In addition, compensation laws were approved by the Territories of Hawaii (1915) and Alaska (1915) and by Congress for civil employees of the Federal Government (1908), for the District of Columbia (1919, 1928), and for longshoremen and harbor workers (1927). See U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, Bull. No. 672 (1940) Table 20, p.220.

[12]244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045 (1917).

[13]See Schoene and Watson, *supra* note 1 at 408-409, 413.

ward allowance of recovery with the result that the matter of jurisdiction has been tortured out of reasonable shape.

This is reflected in the evolution of the test used to determine whether the Federal Act is controlling. Having concluded that a federal liability statute could not constitutionally apply to all employees of common carriers engaged in interstate commerce,[14] the Supreme Court was faced with the necessity of formulating a test by which the parties and the courts could determine whether a claimant was engaged in interstate commerce within the purview of the FELA. In *Pedersen v. Delaware, L. & W. R. R.*,[15] the Supreme Court found the test to be whether the work in which the employee was engaged at the time of his injury was "a part of the interstate commerce in which the carrier is engaged" or was "so closely connected therewith as to be a part of it."[16] Here the emphasis was on the word "commerce," used in a general comprehensive sense as in the statute. A few years later a more restrictive test was adopted in *Shanks v. Delaware, L. & W. R. R.*[17] With studied precision, the true test of interstate commerce was held to be whether at the time of the injury the employee was "engaged in interstate transportation or in work so closely related to it as to be practically a part of it."[18] Here the physical operations of transportation and their immediately adjoining incidents constituted the controlling criterion.

In the years preceding the 1939 amendment, the Court treated the jurisdictional issue in no less than 43 decisions.[19] Unfortunately the test in the *Shanks* case did not lend itself to easy application, and the result was a confusion so complicated that in many cases the determination of jurisdiction was difficult and doubtful. For example, for some years the federal remedy was available to employees engaged in the operations involved in supplying water or sand for the use of locomotives engaged in interstate commerce;[20] but this was not true as to the coal used to produce steam in the locomotives.[21] In 1932, the court, specifically overruling the prior cases, concluded that all such supply operations were not within the FELA,[22] though apparently the preparing of a locomotive assigned to

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[14]Employers' Liability Cases, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297 (1908).
[15]229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125 (1913).
[16]*Id.* at 151-152, 33 S.Ct. at 649-650, 57 L.Ed. at 1128.
[17]239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436 (1916).
[18]*Id.* at 558, 36 S.Ct. at 189, 60 L.Ed. at 438. See note 24 *infra*.
[19]These cases are discussed in Schoene and Watson, *supra* note 1 at 399-406.
[20]Erie R.R. v. Collins, 253 U.S. 77, 40 S.Ct. 450, 64 L.Ed. 790 (1920).
[21]Chicago, B. & Q. R.R. v. Harrington, 241 U.S. 177, 36 S.Ct. 517, 60 L.Ed. 941 (1916).
[22]Chicago & Eastern Ill. R.R. v. Industrial Comm., 284 U.S. 296, 52 S.Ct. 151, 76 L.Ed. 304, 77 A.L.R. 1367 (1932).

specific interstate service by inspecting, oiling and firing it is a part of interstate commerce.[23] It is noteworthy that shortly before, at the same term, the court felt the need to reassert the distinction between "commerce" as used in the Act and "transportation" as defining "commerce" in the *Shanks* case.[24] The general problem was then the subject of considerable critical comment.[25] It was generally agreed that the situation had become intolerable and that Congress ought to take remedial steps.

To be sure, as early as 1912, following a comprehensive investigation,[26] an attempt to enact a railroad workmen's compensation law proved abortive, though it came within an ace of succeeding.[27] In the 1930's, the American Association for Labor Legislation actively worked for a federal compensation system.[28] A bill modeled on the Longshoremen's and Harbor Workers' Compensation Act[29] was prepared. In its final form, it was of almost comprehensive coverage and applied to all workers employed by carriers of interstate commerce, including railroads, express, and sleeping car companies, and any person operating a vehicle or airplane on a regular route.[30] The bill was repeatedly introduced in Congress by Senator Wagner;[31] but, while it apparently had the support of almost all interested parties,[32] it failed of passage.

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[23]North Carolina RR. v. Zachary, 232 U.S. 248, 34 S.Ct. 305, 58 L.Ed. 591 (1914).

[24]Speaking of the *Shanks* test, Mr. Justice Sutherland said: "It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; . . . The applicable test thus firmly established is not to be shaken by the one or two decisions of this court where, inadvertently, the word 'commerce' has been employed instead of the word 'transportation.'" Chicago & N.W. Ry. v. Bolle, 284 U.S. 74, 78-80, 52 S.Ct. 59, 61, 76 L.Ed. 173, 176, 177 (1931).

[25]See the articles cited in note 1 *supra* and note 32 *infra*.

[26]See Report of Commission to Investigate the Matter of Employers' Liability and Workmen's Compensation, SEN. Doc. No. 338, 62d Cong., 2d Sess. (1912), known as the Sutherland Commission report.

[27]The bill (S. 5382, 62d Cong., 2d Sess.) was passed by the Senate on May 6, 1912, and then by the House with minor amendments on March 1, 1913. See 48 CONG. REC. 5923-5959 (1912) and 49 CONG. REC. 4476-4547 (1913). No conference between the houses was held, and the bill died allegedly because of delaying tactics of lawyers getting large fees under the FELA. See Clark, *supra* note 1 at 808, and *cf.* 49 CONG. REC. 4562-4563 and 4676-4677 (1913).

[28]See Andrews, *Interstate Compensation for Transportation Workers* (1935) 25 AM. LABOR LEG. REV. 169 and Gellhorn, *supra* note 1.

[29]Act of March 4, 1927, 44 STAT. 1424 (1927), 33 U.S.C. §§ 901-950 (1940).

[30]See statement of Senator Wagner accompanying S. 3152, 74th Cong., 1st Sess., in 79 CONG. REC. 10030 (1935).

[31]See S. 4927, 72d Cong., 1st Sess., 75 CONG. REC. 13760 (1932); S. 5695, 72d Cong., 2d Sess., 76 CONG. REC. 5069 (1933); S. 1320, 73d Cong., 1st Sess., 77 CONG. REC. 1624 (1933); S. 3630, 73d Cong., 2d Sess., 78 CONG. REC. 8982 (1934); S. 3152, 74th Cong., 1st Sess., 79 CONG. REC. 10029 (1935).

[32]See Richberg (General Counsel, Railway Labor Executives' Association),

Other suggestions were made to adjust the situation. Certain commentators contended with considerable merit that the FELA should be repealed and railroad workers left to their remedies under state law.[33] As a matter of practical politics, however, the wide disparity of state compensation rates precluded a return to parochial relief.[34]

Finally, it had long been known that the Federal Act did not extend to its possible constitutional limits. In *Illinois Cent. R. R. v. Behrens*,[35] Mr. Justice Van Devanter explained that the First Employers' Liability Act was declared invalid as an attempt

> . . . to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employee, even though his employment had no connection whatever with interstate commerce.[36]

Conversely, if the worker's employment can be shown to have a connection with interstate commerce, it may be constitutionally regulated by Congress. In the *Behrens* case, the issue was whether the fireman of a switching crew engaged generally in switching interstate and intrastate cars was within the FELA when at the time of the fatal accident the crew was engaged in moving several intrastate cars from one part of the city to another preparatory to switching certain interstate cars. The Court held in the negative on the ground the statute did not so provide. Congress had the power to give federal redress to such an employee, but had not exercised it. Pointing out the intermingled interstate and intrastate character of railroad traffic and operations and "the practical difficulty in

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Advantages of a Federal Compensation Act for Railway Employees (1931) 21 Am. Labor Leg. Rev. 401; Richberg, *Workmen's Compensation for Railway Employees* (1933) 23 Am. Labor Leg. Rev. 51; Loree (President of the Delaware and Hudson Railroad Corp.), *Railway Employer Favors Workmen's Compensation* (1933) 23 Am. Labor Leg. Rev. 110; Harrison (President, Brotherhood of Railway and Steamship Clerks), *Railway Labor Favors Federal Accident Compensation Law* (1934) 24 Am. Labor Leg. Rev. 161. The Brotherhood of Railroad Trainmen, however, opposed the enactment of a compensation act for railway workers in 1913 and 1931. See Doak (then Secretary of Labor, formerly legislative representative of this brotherhood), *The Attitude of the Railroad Brotherhoods toward Workmen's Compensation and the Reasons for Such Attitude*, U.S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 564 (1932) 53. And see Andrews, *supra* note 28 at 171.

[33]See Schoene and Watson, *supra* note 1 at 414-424.

[34]See Doak, *supra* note 32 at 54-56, in which one of the reasons given for opposing a railway compensation system was the "inadequate" and "beggarly low" schedules characteristic of the compensation statutes. See also Gellhorn, *supra* note 1 at 922.

[35]233 U.S. 473, 34 S.Ct. 646, 58 L.Ed. 1051 (1914).

[36]*Id.* at 477, 34 S.Ct. at 647, 58 L.Ed. at 1054.

separating or dividing the general work of the switching crew," Mr. Justice Van Devanter commented that

> . . . we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce.[37]

This dictum came down in 1914. Finally, in 1939, disregarding thirty years' experience with the adjustment of industrial disabilities through workmen's compensation, Congress undertook to use its unexercised power and acted by extending the coverage of the Federal Act with the dictum of the *Behrens* case lurking in the legislative background.[38]

—II—

The part of the amendment of August 11, 1939, to the FELA affecting federal jurisdiction consists of a single sentence added to the original Section 1. The benefits of the Act are declared to be available to "any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce." Numerous inquiries suggest themselves at once. What "duties" does the Act contemplate? Are they the duties specifically assigned for performance at the time of the accident? If not, are they the duties to be performed generally by the employee within his regular assignment? Or do "duties" encompass any work which that particular class of employee might be called on to do, irrespective of individual assignment to regularly performed tasks? Is the moment of injury any longer of crucial importance? Is time a factor at all? What "duties" are in "furtherance of interstate or foreign commerce?" Are they different in scope from those which "in any way directly or closely and substantially, affect such commerce?"

The case history of the FELA, the legislative history of the amendment, and its words shed some light. First, it is clear that the amendment is intended to include more railroad workers within the federal statute than theretofore. On the other hand, not all employees are encompassed. Neither the legislative history nor the terminology evinces any endeavor to revive the unconstitutional First Employers' Liability Act.[39] Second,

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[37] *Ibid.*

[38] See note 48 *infra.*

[39] The bill "broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce. . . . The adoption of the proposed amendment will, *to a very large extent,* eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic." (emphasis supplied) SEN. REP. No. 661, 76th Cong., 1st Sess. (1939) 2-3.

Congress had notice of the difficulties and uncertainties attending the determination of jurisdiction under the original statute.[40] Uniformity of treatment and simplification are sought in lieu of the complicated confusion accompanying the operation of the *Shanks* rule. Knowing the necessity of proving transportation or closely related work at the time of the injury and thereby understanding the limited concept of commerce in the original statute, Congress deliberately used the word "commerce" and indicated that the *Shanks* rule is legislatively repudiated.[41] The moment of accident is to be no longer controlling.[42] Yet, though the amendment is silent as to time, the report of the Senate Committee amplifies to the extent that if at the time of injury or death any part of the employee's duties has the required effect on commerce, the benefits of the Act are available.[43] Finally, the original Act was held to provide the exclusive remedy for injuries or deaths incurred in interstate commerce.[44] Nothing in the legislative history of the amendment indicates any intent to effect a change in this respect.[45]

These historical facts bear on the obvious problem of ascertaining which claimants must seek the exclusive relief of the FELA and which must look to locally granted rights. The more practical task of judicial interpretation is to evolve a workable rule by which the location of the remedy can be easily ascertained. Two possible schemes of interpretation have been advanced. In the first, the whole of the employee's duties at the time of the accident are surveyed; if under the prior existing case law any part of the duties was held to be work in interstate commerce within the FELA, then the federal statute is applicable. Consistent with this

[40]The rule in the *Shanks* case and the difficulties of applying it are stated repeatedly throughout the legislative procedure. See SEN. REP. No. 661, 76th Cong., 1st Sess. (1939) 2; the statement of the House Managers accompanying the conference report, 84 CONG. REC. 11107 (1939); and the remarks of Senator Burke, sponsor of the 1939 amendment, quoted in note 41 *infra*.

[41]Senator Burke explained the amendment to Section 1 as ". . . a provision which will remove a great deal of the difficulty which is now encountered in determining whether or not an injured railroad employee was engaged in interstate commerce so as to come within the provisions of the act. Without going into great detail, it simplifies that question very greatly . . ." 84 CONG. REC. 9407 (1939). See note 48 *infra*.

[42]See note 39 *supra*.

[43]"If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act." SEN. REP. No. 661, 76th Cong., 1st Sess. (1939) 3. See note 39 *supra* where "the very instant of death" is dismissed as controlling in determining the character of the employee's work.

[44]New York Cent. R.R. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045 (1917).

[45]The report of the Senate Judiciary Committee refers to cases in which the statute of limitations expired while suit was being prosecuted under the wrong statute and no recovery could be had. The corrective adopted was to extend the coverage of the FELA and not to afford non-liability federal cases access to the state compensation acts. SEN. REP. No. 661, 76th Cong., 1st Sess. (1939) 3.

theory, some judicial authority has asserted that the amendment was intended to include employees who are constantly shifting from one class of service to another, but whose usual and regular duties are interstate in character, though at the time of the accident intrastate functions are being performed.[46] The reference here is principally to the cases involving switching operations and the maintenance of equipment in service, the classification of which the courts have found particularly difficult.[47] Much in the legislative history and the phrase "any part of whose duties" support this view.[48] However, other aspects of the interpretative material favor the contrary view which holds that the Act now embraces injuries in interstate commerce within the broadest possible constitutional limits in contrast to interstate transportation or closely related incidents thereof. At the hearings before the Senate sub-committee, while the amendment was in legislative process, at the suggestion of Senator Austin, the words "in any way directly, or closely and substantially" were substituted for "in any way"[49] so as to conform the language of the amendment to current constitutional limits to the exercise of federal power under the commerce clause as defined in the *Jones & Laughlin* and *Carter Coal* cases.[50]

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[46]The amendment "undoubtedly . . . was intended to apply to a situation where employees are shifting from one class of service to another and it would be difficult, if not impossible, to determine in which type of traffic the worker was engaged at the time of injury. The words 'any part of whose duties' used in the act evidently refer to and mean an employee any part of whose usual, ordinary and regular duties 'shall be the furtherance of interstate or foreign commerce.' Under this amendment the work which an employee is performing at the moment of injury shall no longer decide the jurisdictional issue. If the usual duties of the employee are of interstate character then he comes within the purview of the act even though when an accident occurs, he is engaged in an intrastate function." Wright v. New York Cent. R.R., 263 App.Div. 461, 466, 33 N.Y.S. (2d) 531, 535 (1942), *aff'd.*, 288 N.Y. 719, 43 N.E. (2d) 97 (1942), *cert. denied sub nom.*, Industrial Board v. New York Cent. R.R., 317 U.S. 668 (1942) (ably reasoned dissent).

[47]See Schoene and Watson, *supra* note 1 at 399-403.

[48]"The amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers, who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations. . . . Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce or which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty. . . . The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." SEN. REP. No. 661, 76th Cong., 1st Sess. (1939) 2-3; see also the statement of the House Managers accompanying the conference report, 84 CONG. REC. 11107 (1939).

[49]*Hearings before Subcommittee of Committee on the Judiciary on S. 1708*, 76th Cong., 1st Sess. (1939) 58. See Ermin v. Pennsylvania R.R., 36 F.Supp. 936, 940 (E.D.N.Y. 1941).

[50]NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

Further, the primary purpose of the amendment was to nullify the confusion in the many decisions on the jurisdictional issue and correlatively to establish a rule making for simplicity and reasonable certainty in locating the right of recovery.[51] Such a purpose is frustrated if, as in the ingredient theory above discussed, a part of the employee's duties must be classified by the confused decisions under the *Shanks* rule. And in view of the Congressional awareness of the difficulties in this respect,[52] the broad phraseology—"furtherance" of interstate "commerce" and "in any way directly or closely and substantially affect such commerce"—evinces an intent to secure a broad coverage penetrating deep into the many phases of railroad operation. So much for the pre-court experience of the amendment. The following paragraphs will consider how it has fared in the courts.

—III—

Of the thirty-two reported cases thus far decided under the 1939 amendment, ten actions were brought under the federal statute[53] and twenty-two sought workmen's compensation under state acts.[54] In the cases under the FELA, federal jurisdiction was consistently upheld at all stages of the litigation.[55] In the compensation proceedings, however, the initial determination of the jurisdictional question allowed state exercise of power in eighteen cases and denied it in three.[56] And on intermediate appeal, six decisions affirmed and nine denied it. The final appellate determination weighs the balance heavily against seeking redress under the compensation acts: state appellate tribunals denied recourse to local relief in seventeen cases and allowed it in three.[57] In sum, only three of the thirty-two reported cases—and these three were compensation actions—held that jurisdiction rested in state remedial statutes and not in the FELA.

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[51]See notes 41, 48 *supra.*

[52]See note 40 *supra.*

[53]See cases cited in notes 63-65, 70, 73, 82, 84 *infra;* and McCall v. Pitcairn, 232 Iowa 867, 6 N.W. (2d) 415 (1942), cited note 60 *infra.*

[54]See cases cited in notes 61-62, 66-69, 71-72, 76-81, 83, 85-88 *infra;* and Southern Pacific Co. v. Industrial Accident Comm.. 19 Cal. (2d) 281, 120 P. (2d) 887 (1942), cited note 60 *infra.*

[55]*Cf.* Note (1932) 42 YALE L.J. 226.

[56]State compensation was initially denied in Patsaw v. Kansas City Southern Ry., 56 F.Supp. 897 (W.D. La. 1944), cited note 79 *infra;* Dillard v. Thompson, 5 F.R.D. 26 (W.D. La. 1945), cited note 76 *infra;* and Prader v. Pennsylvania R.R., 113 Ind.App. 518, 49 N.E. (2d) 387 (1943), cited note 80 *infra.*

[57]Workmen's compensation was allowed in Moser v. Union Pacific R.R., 147 P. (2d) 336 (Idaho 1944), cited note 83 *infra;* Thomson v. Industrial Comm., 380 Ill. 386, 44 N.E. (2d) 19 (1942), *cert. denied,* 318 U.S. 755 (1943), cited note 87 *infra;* and Lawrence v. Rutland R.R., 112 Vt. 523, 28 A. (2d) 488 (1942), *cert. denied,* 317 U.S. 693 (1943), cited note 78 *infra.*

Thus far the amendment appears to have located the remedy for those employees engaged directly in transportation, that is, members of train and engine crews and yard workers. This result is clearly contemplated by the legislative history, however vague it is in respect to the extent of the coverage intended.[58] In yard service, the making or breaking up of an interstate train is, as heretofore,[59] an interstate employment.[60] The handling of an intrastate car during switching is now within the Federal Act,[61] even though no interstate cars had been handled by the crew prior to the time of the accident.[62] In road service, the FELA is still held applicable to switching out a local car from an interstate train.[63] The amendment has now extended the federal remedy to trainmen injured while moving dead engines between local points[64] or hauling empty cars ultimately to be loaded with interstate freight.[65]

A like unanimity is surprisingly found in the cases involving the maintenance and rebuilding of equipment used generally in the carrier's transportation service. It is probable that prior to the amendment a different result would have obtained in most of these decisions. So roundhouse employees whose duties included the servicing of locomotives used in interstate transportation were denied workmen's compensation for ac-

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[58]See pp. 212-213 and notes 39, 43, 48 *supra.*

[59]Seaboard Airline Ry. v. Koennecke, 239 U.S. 352, 36 S.Ct. 126, 60 L.Ed. 324 (1915); Erie R.R. v. Winfield, 244 U.S. 170, 37 S.Ct. 556, 61 L.Ed. 1057 (1917); Philadelphia & Reading R.R. v. Polk, 256 U.S. 332, 41 S.Ct. 518, 65 L.Ed. 958 (1921). In notes 60 to 88, inclusive, *infra*, in which are cited the decisions under the 1939 amendment, will also be indicated the cases in accord or contra decided under the original Act. Where no such cases are cited or where cases are compared, the prior law is considered uncertain.

[60]Southern Pacific Co. v. Industrial Accident Comm., 19 Cal. (2d) 281, 120 P. (2d) 887 (1942); McCall v. Pitcairn, 232 Iowa 867, 6 N.W. (2d) 415 (1942). For prior cases in accord, see the cases cited in note 59 *supra.*

[61]Louisville & Nashville R.R. v. Potts, 178 Tenn. 425, 158 S.W. (2d) 729 (1942). *Contra:* Illinois Cent. R.R. v. Behrens, 233 U.S. 473, 34 S.Ct. 646, 58 L.Ed. 1051 (1914).

[62]Lewis v. Industrial Accident Comm., 19 Cal. (2d) 284, 120 P. (2d) 886 (1942). *Contra:* Illinois Cent. R.R. v. Behrens, 233 U.S. 473, 34 S.Ct. 646, 58 L.Ed. 1051 (1914).

[63]Avance v. Thompson, 320 Ill.App. 406, 51 N.E. (2d) 334 (1943); Taylor v. Lumaghi Coal Co., 352 Mo. 1212, 181 S.W. (2d) 536 (1944). *Accord:* New York Cent. & H. R.R. v. Carr, 238 U.S. 260, 35 S.Ct. 780, 59 L.Ed. 1298 (1915).

[64]Ermin v. Pennsylvania R.R., 36 F.Supp. 936 (E.D.N.Y. 1941). *Contra:* Illinois Cent. R.R. v. Behrens, 233 U.S. 473, 34 S.Ct. 646, 58 L.Ed. 1051 (1914); Illinois Cent. R.R. v. Peery, 242 U.S. 292, 37 S.Ct. 122, 61 L.Ed. 309 (1916) (hauling engine in need of repairs intrastate held not within FELA).

[65]Louisville & Nashville R.R. v. Stephens, 298 Ky. 328, 182 S.W. (2d) 447 (1944). The court considered that the case of Illinois Cent. R.R. v. Peery, 242 U.S. 292, 37 S.Ct. 122, 61 L.Ed. 309 (1916) was to the contrary. This is not at all clear. *Cf.* Hoffmann v. New York, N.H. & H. R.R., 74 F. (2d) 227 (C.C.A. 2d, 1934), *cert. denied*, 294 U.S. 715 (1935) (movement of empty cars to be loaded with interstate freight held interstate).

cidental injuries suffered on the way to work[66] or while moving a barrel of oil to be used in the carrier's locomotives and machines.[67] Local relief was similarly barred to a pier employee injured while rolling a barrel of oil to be furnished to the railroad's tugboats transporting interstate freight cars across New York harbor.[68] Maintenance repairs on rolling stock, though they involve the rebuilding of such equipment withdrawn from service, lie outside the pale of state jurisdiction.[69] Similarly, repairing a locomotive used in interstate transportation is employment in interstate commerce,[70] regardless of the engine's withdrawal from service and the fact that the claimant's usual duties related exclusively to what had been considered intrastate activities, that is, boilerwashing locomotives not in active service.[71] And a blacksmith's helper cannot recover state compensation for injuries suffered while making replacement parts to be used in the railroad's locomotives.[72] The amendment has reached its farthest limits in a decision sustaining an action under the FELA by the operator of a crane used in a railroad storehouse to lift wheels and other supplies

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[66]Williams v. Chicago, R.I. & P. Ry., 155 Kan. 813, 130 P. (2d) 596 (1942). The court considered that the decision in North Carolina R.R. v. Zachary, 232 U.S. 248, 34 S.Ct. 305, 58 L.Ed. 591 (1914), supported this result. But this is doubtful. See note 70 *infra*. And compare Erie R.R. v. Winfield, 244 U.S. 170, 37 S.Ct. 556, 61 L.Ed. 1057 (1917) and Erie R.R. v. Welsh, 242 U.S. 303, 37 S.Ct. 116, 61 L.Ed. 319 (1916); Mease v. Reading Co., 126 Pa.Super. 436, 191 A. 402 (1937), *cert. denied*, 302 U.S. 705 (1937) and Mason v. Reading Co., 129 Pa. Super. 289, 195 A. 754 (1937).

[67]Harris v. Missouri Pacific R.R., 158 Kan. 679, 149 P. (2d) 342 (1944). Compare note 68 *infra*.

[68]McFadden v. Pennsylvania R.R., 130 N.J.L. 601, 34 A. (2d) 221 (1943). The court considered that, on the authority of Tonsellito v. New York Cent. & H. R.R., 87 N.J.L. 651, 94 A. 804 (1915), *aff'd.*, 244 U.S. 360, 37 S.Ct. 620, 61 L.Ed. 1194 (1917) (hostler on way to get barrel of oil to be transported to railroad's warehouse outside the state held in interstate commerce), the result would have been the same prior to the amendment. But see notes 69, 70 *infra* and pp. 209-210 *supra* as to supply operations.

[69]Southern Pacific Co. v. Industrial Accident Comm., 19 Cal. (2d) 271, 120 P. (2d) 880 (1942); Southern Pacific Co. v. Industrial Accident Comm., 19 Cal. (2d) 283, 120 P. (2d) 888 (1942). *Contra:* Industrial Accident Comm. v. Davis, 259 U.S. 182, 42 S.Ct. 489, 66 L.Ed. 888 (1922); New York, N.H. & H. R.R. v. Bezue, 284 U.S. 415, 52 S.Ct. 205, 76 L.Ed. 370, 77 A.L.R. 1370 (1932).

[70]Edwards v. Baltimore & Ohio R.R., 131 F. (2d) 366 (C.C.A. 7th, 1942). Compare Minneapolis & St. L. R.R. v. Winters, 242 U.S. 353, 37 S.Ct. 170, 61 L.Ed. 358 (1917) (repairing engine used in interstate service three days before but not then definitely assigned to an interstate task held not within FELA) and New York Cent. R.R. v. Marcone, 281 U.S. 345, 50 S.Ct. 294, 74 L.Ed. 892 (1930) (roundhouse employee last known to have greased an engine last used in interstate commerce and not withdrawn from service found in interstate commerce).

[71]Wright v. New York Cent. R.R., 263 App.Div. 461, 33 N.Y.S. (2d) 531 (1942), *aff'd.*, 288 N.Y. 719, 43 N.E. (2d) 97 (1942), *cert. denied sub nom.*, Industrial Board v. New York Cent. R.R., 317 U.S. 668 (1942). *Contra:* New York, N.H. & H. R.R. v. Bezue, 284 U.S. 415, 52 S.Ct. 205, 76 L.Ed. 370, 77 A.L.R. 1370 (1932).

[72]Trucco v. Erie R.R., 157 Pa.Super. 398, 43 A. (2d) 626 (1945), *aff'd.*, 353 Pa. 320, 45 A. (2d) 20 (1946), *cert. denied*, 66 S.Ct. 1023 (U.S. 1946). *Contra:* Shanks v. Delaware, L. & W. R.R., 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436 (1916)

which were in turn used to repair freight cars employed in interstate commerce.[73]

Conflicting holdings appear in the cases concerning railroad policemen and the construction and maintenance of tracks, right of way and structures. Following the *Pedersen* decision,[74] the courts held generally that track laborers repairing interstate tracks or bridges are engaged in interstate commerce.[75] After the amendment, this rule still holds:[76] so local rights were denied to a yard worker cleaning up cinders and refuse from yard tracks used by interstate trains.[77] Difficulties, however, still arise in classifying activities not directly connected with the physical work of maintenance. Workmen's compensation was awarded to an employee injured while instructing another in the operation of a weeding machine so as to enable compliance with a state statute requiring the cutting of weeds on railroad right of way.[78] But a trackman injured while on a trip to get tools needed for the repair of interstate track[79] or while on his way to get a rule book to familiarize himself with the duties of a flagman on a gang repairing interstate track[80] is not so fortunate and must seek doubtful relief under the FELA. This is now also true as to laborers loading material for the repair or protection of interstate track.[81] Three cases involved trackmen engaged in the construction of new tracks to be employed, when completed, in interstate commerce. Two were actions under the Federal Act, and its jurisdiction was held to have been properly

[73]Shelton v. Thomson, 148 F. (2d) 1 (C.C.A. 7th, 1945). *Contra:* Shanks v. Delaware, L. & W. R.R., 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436 (1916).

[74]Pedersen v. Delaware, L. & W. R.R., 229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125 (1913), in which the Court held an iron worker carrying bolts to an interstate bridge to be used in its repair was entitled to sue under the FELA.

[75]But not without difficulty as to auxiliary operations. The gymnastics of judicial interpretation in this regard are described in Schoene and Watson, *supra* note 1 at 403-405.

[76]Dillard v. Thompson, 5 F.R.D. 26 (W.D. La. 1945). *Accord:* Pedersen v. Delaware, L. & W. R.R., 229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125 (1913).

[77]Piggue v. Baldwin, 154 Kan. 708, 121 P. (2d) 183 (1942). *Accord:* Pedersen v. Delaware, L. & W. R.R., 229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125 (1913).

[78]Lawrence v. Rutland R.R., 112 Vt. 523, 28 A. (2d) 488 (1942), *cert. denied,* 317 U.S. 693 (1943). The court relied largely on Plass v. Central N.E. Ry., 226 N.Y. 449, 123 N.E. 852 (1919) (section man poisoned while mowing grass on interstate right of way to satisfy requirement of state statute held not engaged in interstate commerce). It found justified a finding that the work was being done in compliance with the state statute requiring the cutting of weeds on railroad rights of way. But *cf.* Pedersen v. Delaware, L. & W. R.R., 229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125 (1913), cited *supra* note 74. And see note 97 *infra.*

[79]Patsaw v. Kansas City Southern Ry., 56 F.Supp. 897 (W.D. La. 1944). As to the prior law, see note 66 *supra.*

[80]Prader v. Pennsylvania R.R., 113 Ind.App. 518, 49 N.E. (2d) 387 (1943). As to the prior law, see note 66 *supra.*

[81]Skanks v. Union Pacific R.R., 155 Kan. 584, 127 P. (2d) 431 (1942); Rainwater v. Chicago, R.I. & P. Ry., 207 La. 681, 21 So. (2d) 872 (1945). The cases on loading and unloading track material prior to the amendment are in confusion. See Schoene and Watson, *supra* note 1 at 403-405.

invoked.[82] The third case is opposed, a divided and articulate court allowing workmen's compensation under the state statute.[83] The maintenance of railroad structures is now held to be a matter of federal concern. Repairs to a roundhouse in which interstate engines are serviced[84] or to ore docks used exclusively for handling interstate iron ore from boats to rail cars[85] constitute commerce within the FELA. And a signalman cannot recover compensation for injuries suffered while installing new lights at a passenger station.[86]

The lot of the railroad policeman remains uncertain. State jurisdiction operates in Illinois to give workmen's compensation to a policeman for injuries incurred while trying to eject trespassers from railroad property.[87] In Maryland, however, the state act was held inapplicable to the accidental death of a special policeman whose duties likewise included the protection of interstate freight within his patrol.[88]

So much for the factual situations involved in the decisions. Collateral holdings in the cases may be briefly examined. It is generally asserted that the amendment should be liberally construed.[89] In proceedings denying compensation, its constitutionality has been attacked but upheld on the rule that the fact that intrastate commerce may be interwoven with interstate commerce does not prevent the exercise of Congressional power over

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[82]Agostino v. Pennsylvania R.R., 50 F.Supp. 726 (E.D.N.Y. 1943); Missouri Pacific R.R. v. Fisher, 206 Ark. 705, 177 S.W. (2d) 725 (1944). *Contra:* Raymond v. Chicago, M. & St. P. Ry., 243 U.S. 43, 37 S.Ct. 268, 61 L.Ed. 583 (1917).

[83]Moser v. Union Pacific R.R., 147 P. (2d) 336 (Idaho 1944). *Accord:* Raymond v. Chicago, M. & St. P. Ry., 243 U.S. 43, 37 S.Ct. 268, 61 L.Ed. 583 (1917).

[84]Zimmermann v. Scandrett, 57 F.Supp. 799 (E.D. Wis. 1944). *Contra:* Shanks v. Delaware, L. & W. R.R., 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436 (1916).

[85]Great Northern Ry. v. Industrial Comm., 245 Wis. 375, 14 N.W. (2d) 152 (1944). Compare Pedersen v. Delaware, L. & W. R.R., 229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125 (1913); Guida v. Pennsylvania R.R., 183 App.Div. 822, 171 N.Y.S. 285 (1918), *aff'd.* without opinion, 224 N.Y. 712, 121 N.E. 871 (1918); and Sullivan v. New York, N.H. & H. R.R., 74 F. (2d) 725 (C.C.A. 2d, 1935). *Cf.* also notes 69, 70 *supra.*

[86]Scarborough v. Pennsylvania R.R., 154 Pa.Super. 129, 35 A. (2d) 603 (1944). The court deemed it doubtful whether the claimant would have been within the FELA prior to the amendment. *Contra:* Shanks v. Delaware, L. & W. R.R., 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436 (1916); Sullivan v. New York, N.H. & H. R.R., 105 Conn. 122, 134 A. 795 (1926), *cert. denied,* 273 U.S. 754 (1927).

[87]Thomson v. Industrial Comm., 380 Ill. 386, 44 N.E. (2d) 19 (1942), *cert. denied,* 318 U.S. 755 (1943). The court followed the Illinois rule which it said was contrary to decisions in other states prior to the amendment. But see note 88 *infra.*

[88]Albright v. Pennsylvania R.R., 183 Md. 421, 37 A. (2d) 870 (1944), *cert. denied,* 323 U.S. 735 (1944). The cases prior to the amendment are in confusion. See Schoene and Watson, *supra* note 1 at 405-406.

[89]Ermin v. Pennsylvania R.R., 36 F.Supp. 936, 941 (E.D.N.Y. 1941); Agostino v. Pennsylvania R.R., 50 F.Supp. 726, 729 (E.D.N.Y. 1943); Scarborough v. Pennsylvania R.R., 154 Pa.Super. 129, 133, 35 A. (2d) 603, 605 (1944).

interstate commerce.[90] In the Illinois case allowing state relief to a railroad policeman injured while ejecting trespassers from railroad property, the court found that the amendment would be beyond the power of Congress insofar as it attempts to include the employees of interstate carriers at all times, regardless of whether their immediate employment is in interstate commerce or affects such commerce.[91] And it has been held that the remedy provided by the FELA is still exclusive.[92] The time element has generally been disregarded, but in two of the three decisions upholding state jurisdiction the test used seems to be confined to the time of the accident.[93] Finally, the decisions have rejected the contention that the amendment applies only to those cases where the employment constantly shifts between intrastate and interstate activities.[94]

No case involving a conflict of jurisdiction between the FELA and state law has been considered by the Supreme Court since 1932. Under the 1939 amendment, certiorari was sought, but denied in five cases, all of them compensation proceedings.[95] Relief under the state acts was allowed in two of these decisions and refused in three. Two of the cases involved railroad policemen and are diametrically opposed.[96] Two others,

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[90]Southern Pacific Co. v. Industrial Accident Comm., 19 Cal. (2d) 271, 279, 120 P. (2d) 880, 885 (1941); Prader v. Pennsylvania R.R., 113 Ind.App. 518, 526-527, 49 N.E. (2d) 387, 390-391 (1943).

[91]Thomson v. Industrial Comm., 380 Ill. 386, 392, 44 N.E. (2d) 19, 22 (1942), *cert. denied*, 318 U.S. 755 (1943). This conclusion was based on the Employers' Liability Cases, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297 (1908) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

[92]Southern Pacific Co. v. Industrial Accident Comm., 19 Cal. (2d) 271, 280-281, 120 P. (2d) 880, 885 (1941); Prader v. Pennsylvania R.R., 113 Ind.App. 518, 528, 49 N.E. (2d) 387, 391 (1943).

[93]In Moser v. Union Pacific R.R., 147 P. (2d) 336, 345 (Idaho 1944), the Chief Justice, dissenting, criticized the majority for confining its determination of commerce to the "*time* or moment, he (the claimant) sustained his injury." In Thomson v. Industrial Comm., 380 Ill. 386, 44 N.E. (2d) 19 (1942), *cert. denied,* 318 U.S. 755 (1943), the court considered that the amendment merely changed the test in that now the question is whether the employee's activity at the time of the accident directly or closely and substantially affects interstate commerce.

[94]Great Northern Ry. v. Industrial Comm., 245 Wis. 375, 382, 14 N.W. (2d) 152, 155 (1944); *cf.* Wright v. New York Cent. R.R., 263 App.Div. 461, 33 N.Y.S. (2d) 531 (1942), *aff'd.*, 288 N.Y. 719, 43 N.E. (2d) 97 (1942), *cert. denied sub nom.*, Industrial Board v. New York Cent. R.R., 317 U.S. 668 (1942).

[95]Thomson v. Industrial Comm., 380 Ill. 386, 44 N.E. (2d) 19 (1942), *cert. denied,* 318 U.S. 755 (1943), cited *supra* note 87; Albright v. Pennsylvania R.R., 183 Md. 421, 37 A. (2d) 870 (1944), *cert. denied,* 323 U.S. 735 (1944), cited *supra* note 88; Wright v. New York Cent. R.R., 263 App.Div. 461, 33 N.Y.S. (2d) 531 (1942), *aff'd.*, 288 N.Y. 719, 43 N.E. (2d) 97 (1942), *cert. denicd sub nom.*, Industrial Board v. New York Cent. R.R., 317 U.S. 668 (1942), cited *supra* note 71; Trucco v. Erie R.R., 157 Pa.Super. 398, 43 A. (2d) 626 (1945), *aff'd.*, 353 Pa. 320, 45 A. (2d) 20 (1946), *cert. denied,* 66 S.Ct. 1023 (U.S. 1946); Lawrence v. Rutland R.R., 112 Vt. 523, 28 A. (2d) 488 (1942), *cert. denied,* 317 U.S. 693 (1943), cited *supra* note 78.

[96]Thomson v. Industrial Comm., Albright v. Industrial Comm., both *supra* note 95.

both denying compensation, extended the coverage of the Federal Act beyond its original limits. The fourth, a Vermont case allowing compensation, is difficult to reconcile with prior well-established precedent, though its result apparently hinges on the deficiencies of the record.[97] The Supreme Court, however, has considered the FELA in certain cases involving the determination of the scope of the Fair Labor Standards Act.[98] In *Overstreet v. North Shore Corp.*,[99] maintenance and operating employees of a private corporation operating a toll road providing the only means of land communication between an island and the Florida mainland, and in connection therewith a drawbridge over a navigable stream, were held to be engaged in interstate commerce within the FLSA. The Court used the "practical test" laid down in the *Pedersen* and related cases,[100] especially since those cases were called to the attention of Congress when the FLSA jurisdictional provision was being considered. Later at the same term, in *McLeod v. Threlkeld*,[101] the question arose whether a cook employed by an independent contractor to prepare and serve meals to maintenance-of-way employees of an interstate railroad is within the FLSA. The Court was confronted with its decision in *Philadelphia, B & W. R. R. v. Smith*,[102] in which a cook for a gang of carpenters repairing railroad bridges used in interstate commerce was found entitled to sue under the FELA. The Court held that the cook was not within the FLSA, affirmed that the more restrictive test of the *Shanks* case is to be used rather than the "practical test" of the *Pedersen* case, and rejected the *Smith* case as a basis for an affirmative finding on the ground that decision was made before the re-affirmation of the *Shanks* test in 1934.[103] Yet Mr. Justice Reed, speaking for the majority, states:

> The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be re-

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[97]The court discerned no basis for a finding of interstate commerce since the commissioner's findings were silent as to the general duties of the injured employee. Lawrence v. Rutland R.R., 112 Vt. 523, 530, 28 A. (2d) 488, 491 (1942), *cert. denied*, 317 U.S. 693 (1943). See note 78 *supra*.

[98]Act of June 25, 1938, 52 STAT. 1060 (1938), 29 U.S.C. §§ 201-219 (1940).

[99]318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943).

[100]Discussing the *Pedersen* case, Mr. Justice Murphy said: "It was pointed out that tracks and bridges were indispensable to interstate commerce and 'that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it.' . . . We think that practical test should govern here." Overstreet v. North Shore Corp., 318 U.S. 125, 129, 63 S.Ct. 494, 497, 87 L.Ed. 656, 660 (1943).

[101]319 U.S. 491, 63 S.Ct. 1248, 87 L.Ed. 1538 (1943).

[102]250 U.S. 101, 39 S.Ct. 396, 63 L.Ed. 869 (1919).

[103]See page 210 and note 24 *supra*.

peated in the administration and operation of the Fair Labor Standards Act.[104]

In his dissent, Mr. Justice Murphy asserted that the effect of rejecting the *Smith* case for the narrower concept of the *Shanks* rule is to introduce into the administration of the FLSA "that concededly undesirable confusion which characterized the Federal Employers' Liability Act and prompted the 1939 amendment."[105] Thus, it is clear that the Court is cognizant of the jurisdictional troubles attending the application of the FELA and of the 1939 amendment as the intended remedy for the confused situation.

Still no case involving the scope of the FELA has been allowed to reach the Court. Two explanations may be suggested for its failure to grant certiorari thus far. First, the Court may be looking to a theory of optional recovery recently advanced in a decision under the Longshoremen's Act. In *Davis v. Dept. of Labor,*[106] a structural steel worker, while helping to dismantle a bridge, fell or was knocked from a barge into the stream and was drowned. The state court held that compensation could not be allowed under the local act. On appeal, the Supreme Court reversed, holding in effect that if the case is a close one, the claimant at his option may have recovery under either the state statute or the Longshoremen's Act. In one of the three cases allowing compensation after the 1939 amendment to the FELA, the state court adverted to this decision in support of the proposition that the jurisdiction of state tribunals should be surrendered only where lack of jurisdiction is clearly shown to exist.[107] No such theory, however, prevailed in the administration of the FELA prior to the amendment. Congress had notice of the mutually exclusive remedies of the FELA and the state statutes. And in fact, nineteen of the twenty-two compensation proceedings denied relief. Finally, compensation was denied in three of the cases in which certiorari was sought. If optional recovery were the rule in proceedings of the present type, the judgments of the lower courts adverse to the claimant called for review and reversal by the Supreme Court.

Secondly, it may be suggested that by denying certiorari the Court is impliedly inviting the claimant to sue and recover under the FELA. This disregards the possibility of the running of the statute of limitations

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[104]McLeod v. Threlkeld, 319 U.S. 491, 495, 63 S.Ct. 1248, 1250, 1251, 87 L.Ed. 1538, 1542 (1943).

[105]*Id.* at 500, 63 S.Ct. at 1253, 87 L.Ed. at 1545.

[106]317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942).

[107]Moser v. Union Pacific R.R., 147 P. (2d) 336, 340 (Idaho 1944). One of the dissenting judges was also considerably disturbed by the *Davis* case. *Id.* at 347-348. The decision, however, rests on a finding that neither the claimant's work nor his duties met the requirements of the FELA.

and, more vitally, assumes that the carrier's negligence can always be proved. In some quarters, however, it has been asserted that the recent trend has been to convert the FELA into a workmen's compensation statute without the establishment of a schedule of limited benefits characteristic of the compensation systems.[108] The Court itself has of late discussed the point.[109] Yet, as is shown by a recent case denying recovery under the FELA, negligence as an essential element of liability has not been entirely read out of the federal statute.[110]

Whatever the reason for the Court's failure to grant certiorari, no authoritative word has been thus for vouchsafed, despite the inconsistent results previously noted. The sole recourse is to the decisions of the state and lower federal courts.

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The trend of the decisions is undoubtedly toward the predominance of federal jurisdiction; and, the legislative history considered, this is an expectable result. One court considered the language of the amendment "very comprehensive, so inclusive indeed that most employees come within its scope";[111] and another, though it allowed recovery of state compensation, remarked that the scope of the FELA "has been broadened by the amendment . . . so as to include practically all employees of interstate carriers."[112] Now, if the amendment was not intended to cover all railroad workers, the inquiry arises whether the courts have thus far evolved a workable rule to ascertain when the claimant must sue under the amended FELA and when under state law. In a few decisions, the ingredient

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[108]See Report of Standing Committee on Developments in the Law to the Public Utility Section, A.B.A. (1941) 132-133.

[109]Trial by jury as the method of "determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided." Mr. Justice Douglas speaking for the Court in Bailey v. Central Vermont Ry., 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444, 1448 (1943).

". . . I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. . . . I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence." Mr. Justice Roberts dissenting in *id.* at 358, 63 S.Ct. at 1066, 87 L.Ed. at 1450.

[110]Brady v. Southern Ry., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943).

[111]Scarborough v. Pennsylvania R.R., 154 Pa.Super. 129, 132, 35 A. (2d) 603, 605 (1944).

[112]Lawrence v. Rutland R.R., 112 Vt. 523, 529-530, 28 A. (2d) 488, 491 (1942), *cert. denied*, 317 U.S. 693 (1943).

theory of interpretation[113] seems to be followed and consideration given the injured worker's general duties.[114] Generally, however, the courts, after stating the facts, have concluded in the words of the statute that the claimant's work was in furtherance of interstate commerce or directly or closely and substantially affected it.[115] The general tenor of these decisions is that the amendment has broadened the coverage of the FELA and that the particular work in question falls within the extended coverage. No effort has been made to find a means to define a dividing line between cases falling within federal jurisdiction and those left to state authority. In fact, judicial experience with the *Shanks* rule makes it quite doubtful whether a dividing line can be defined with any degree of certainty. Certainly mere statement of the statutory rule is of little, if any, help. In the circumstances a claimant can do no more than ascertain how far the courts have gone in various types of cases[116] in affirming or requiring recourse to the federal remedy and then determine whether his claim falls within the limits of those cases. He will find that the jurisdiction of the FELA now extends as far as backshop employees and workers repairing railroad structures. Yet all this is small comfort. For two track laborers and one railroad policeman successfully obtained workmen's compensation under state laws; but others did not. The most that can be said in a general way is that the 1939 amendment to the FELA has been usually so applied as to restrict the kinds of work or types of employment as to which state relief is available to injured railroad employees.

This predominance of federal jurisdiction means that in no-fault cases recovery will not be had even in small measure. It is noteworthy that twenty-two of the thirty-two reported decisions were proceedings seeking workmen's compensation; and since in cases of sufficient value to justify

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[113]See pp. 213-214 *supra.*

[114]See, *e.g.*, Prader v. Pennsylvania R.R., 113 Ind.App. 518, 526, 49 N.E. (2d) 387, 390 (1943), in which the court conceded that at the time of accident the claimant was not engaged in interstate commerce, but found him within the FELA because a part of his duties included the maintenance and repair of interstate tracks; Missouri Pacific R.R. v. Fisher, 206 Ark. 705, 710, 177 S.W. (2d) 725, 727 (1944); and Taylor v. Lumaghi Coal Co., 352 Mo. 1212, 1221, 181 S.W. (2d) 536, 538-539 (1944). *Cf.* Ermin v. Pennsylvania R.R., 36 F.Supp. 936 (E.D.N.Y. 1941).

[115]See, *e.g.*, Edwards v. Baltimore & Ohio R.R., 131 F. (2d) 366 (C.C.A. 7th, 1942); Skanks v. Union Pacific R.R., 155 Kan. 584, 127 P. (2d) 431 (1942); and Scarborough v. Pennsylvania R.R., 154 Pa.Super. 129, 35 A. (2d) 603 (1944).

[116]The list of divisions prescribed by the ICC for use by the carriers in reporting accidents enumerates 128 classes of railroad employment. The six major sub-divisions are executives, officials, and staff assistants; professional, clerical, and staff assistants; maintenance of way and structures; maintenance of equipment and stores; transportation other than train, engine, and yard; and transportation, train, engine, and yard. See the ICC's order of December 17, 1932, in this regard. The 32 decisions under the 1939 amendment have covered 14 or 15 classes and all six major sub-divisions except one and possibly two.

suit the measure of recovery is likely to be considerably greater under the FELA, it may be fairly assumed that state relief was sought in these cases because of the claimant's evident inability to prove negligence.[117] Prior to the amendment and its consequent restriction of parochial relief, a greater number of the no-fault cases fell within the scope of the state compensation laws. With full recognition of the hazards of prognostication in the present circumstances, an examination of the thirty-two cases[118] so far decided indicates that under the prior law the result would have been the same in eight cases (three allowing federal actions and three denying and two allowing compensation), the opposite in twelve cases (five allowing federal relief and seven denying compensation) and doubtful in twelve cases (two sanctioning federal actions and nine refusing and one granting compensation). Differently stated, on the basis of the present experience, the 1939 amendment has had the effect of allowing relief in five federal actions and denying compensation in seven cases whereas under prior law the contrary result would have obtained. The amendment also permitted two federal actions, led to the denial of state relief in nine proceedings and did not stand in the way of a grant of compensation in one case, whereas under prior law the result would have been doubtful. Thus, the extension of federal relief, while it aids employees injured through negligence, is likely resulting in the denial of any recovery whatever in a substantial number of no-fault cases in which, under the prior law, some recompense would have been secured under state compensation statutes.

What circumstances justify or account for such a situation? The FELA does not limit the claimant's recovery to a scale of benefits generally based on the worker's earnings as provided in the compensation statutes. The possibility of a large verdict appears to be a factor which has induced some segments of railway labor not to favor some scheme of workmen's compensation for its workers.[119] The wisdom of this preference for the FELA has been doubted,[120] and some commentators have, in fact, asserted that the effective opposition to a federal compensation system has come from "damage suit lawyers."[121] The present method of adjusting these accident liabilities with its full-dress court procedure and the difficult issues of jurisdiction, negligence and assumption of risk make it almost imperative for the claimant to retain counsel; and the statement

[117]Moser v. Union Pacific R.R., 147 P. (2d) 336, 348 (Idaho 1944) (dissent).
[118]See notes 60 to 88 *supra*.
[119]See Gellhorn, *supra* note 1 at 910.
[120]See the report made by the Section of Labor Relations of the Office of the Federal Coordinator of Transportation, *Cost of Railroad Employee Accidents, 1932*, SEN. Doc. No. 68, 74th Cong., 1st Sess. (1935) 5-6; Gellhorn, *supra* note 1 at 910; and the Sutherland Commission Report, *supra* note 26 at 21-24.
[121]Clark, *supra* note 1 at 808. See also note 27 *supra*.

may be ventured that it results in larger legal fees than under the compensation schemes.[122] Moreover, the claimant faces numerous other problems and uncertainties: he has no assurance of adequate medical attention throughout the period of disability, though the employer may usually find it advantageous to provide medical service at least during the period required for investigation; there is inevitable delay in obtaining redress under the FELA, and the claimant must make arrangements to meet living expenses until funds from a settlement or judgment are available; if such funds are forthcoming, he has the problem of investing and preserving the lump sum recovered; and if not, and his disability continues, he becomes a public charge.

Nonetheless, the 1939 amendment to the FELA was supported by the railway brotherhoods.[123] If their objective is a determinant of liability similar to a workmen's compensation statute but without a schedule of limited benefits and if, as has been suggested, the concept of negligence in the FELA is being evolved into one of absolute liability, their position may seem to serve the self interest of the workers in some measure. On the other hand, such a system of absolute liability might be difficult to justify economically and politically. No other group of labor works under a wide open scheme of liability for industrial disabilities, and excessive accident costs ultimately fall on the public. Howsoever this may be, proof of negligence is still required to support recovery under the FELA. If, as the 32 cases thus far decided seem to indicate, the 1939 amendment to the Act is operating to include more railroad employees within its purview than theretofore, it follows that an increased number of no-fault cases, formerly compensable under state acts, now result in no recovery whatever. This legislative denial of relief is unconscionable. Railway accidents to employees ought to be covered by some system of compensation providing prompt relief and adequate benefits and eliminating fault as an element of recovery.

To be sure, most state compensation systems could quickly be made operative by repeal of the FELA with an express statement that the repeal is not intended to preclude state regulation of the subject.[124] This would make applicable to rail employees the variations in state laws peculiarly adapted to local conditions and also the progressive changes made by the states for the improvement of industrial accident compensation, relief, and rehabilitation. It would also put the railroads on the same

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[122] *Cf.* Doak, *supra* note 32 at 55.

[123] 84 CONG. REC. 9407 (1939). See *Hearings before Subcommittee of Committee on the Judiciary on S. 1708,* 76th Cong., 1st Sess. (1939) 58.

[124] See page 211 *supra* and Schoene and Watson, *supra* note 1 at 416.

competitive level in this regard as carriers by motor vehicle and air.[125] And, lastly, it would eliminate the irremediable problem of determining under what law to sue. On the other hand, a return to state control would sacrifice a uniformity which may be desired for an industry consisting in the main of large units operating transportation facilities in many states. In any event it is doubtful whether practical political considerations would permit the passage of any scheme other than a uniform federal system of compensation.[126] Benefits under the state acts vary widely,[127] and railway workers might be loath to accept any scale of allowances lower than the most liberal of the state compensation schedules.

In short, the prospective solution is a system of federal workmen's compensation for railroad employees. The Supreme Court has spoken harshly of the present law,[128] and almost four decades of experience with it has demonstrated that the dual system of accident relief has inherent administrative difficulties, particularly the problem of jurisdiction. The prevention of these difficulties calls for an administrative scheme of occupational disability compensation applicable to *all* employees of railroads engaged in interstate commerce. An all-inclusive coverage would, of course, run afoul the condemnation of the *First Employers' Liability Cases*. But, in view of the phenomenal expansion of the commerce power in the last decade,[129] the prediction may be safely made that those cases would now be overruled.[130] The transportation of property and persons is the clearest form of "commerce among the several states," and the integrated, almost inseparable nature of railroad operations has had to be recognized by the Supreme Court in determining many constitutional

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[125]See Gellhorn, *supra* note 1 at 919-922.

[126]See note 32 *supra*.

[127]See U. S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, Bull. No. 672 (1940) 71-111, 202-214.

[128]See note 109 *supra* and Mr. Justice Frankfurter concurring in Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 71-73, 63 S.Ct. 444, 453, 454, 87 L.Ed. 610, 619, 620 (1943): "Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation (the FELA) has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence. . . . But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed, in one of its senses, by the phrase 'assumption of risk,' namely, that a carrier is not liable unless it was negligent."

[129]See Stern, *The Commerce Clause and the National Economy, 1933-1945* (1946) 59 HARV. L. REV. 645, 883.

[130]See the slighting treatment given the Employers' Liability Cases, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297 (1908) by Mr. Justice Stone in Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 557, 57 S.Ct. 592, 604, 81 L.Ed. 789, 804, 805 (1937).

questions affecting the carriers. The Court has long sanctioned federal control of many intrastate phases of railroad operations.[131] A recent intimation that the FELA as amended has fully utilized the constitutional power of Congress in this regard needs but momentary notice.[132] The dictum is so briefly stated that it is impossible to tell whether the 1939 amendment was considered as bringing all railroad employees within the scope of the FELA. And a more extended discussion of the question, through arguendo, but by a more conservative Court, indicates that an all-inclusive federal compensation act would have constitutional approval.[133]

Over thirty years ago the Sutherland Commission unanimously recommended to Congress the enactment of a national system of compensation for the occupational disabilities of railroad workers,[134] but without

[131]Baltimore & Ohio R.R. v. ICC, 221 U.S. 612, 31 S.Ct. 621, 55 L.Ed. 878 (1911) (federal hours-of-service requirements held applicable to employees engaged in intrastate work in connection with the movement of interstate trains); Southern Ry. v. United States, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911) (Federal Safety Appliance Acts applicable to all equipment owned by an interstate railroad whether used in interstate or intrastate commerce); Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916) (switchman injured while engaged in intrastate commerce entitled to sue under Safety Appliance Acts); Houston & Texas Ry. v. United States (the Shreveport Case), 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914) (intrastate rates held subject to federal control); Texas & New Orleans R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034 (1930) (right of intrastate employees to choose bargaining agents under the Railway Labor Act upheld); Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937) (backshop workers of an interstate railroad held within the Railway Labor Act).

[132]"Again, half a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that when it (Congress) wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce." Mr. Justice Frankfurter in Polish Nat. Alliance v. NLRB, 322 U.S. 643, 647, 64 S.Ct. 1196, 1198, 88 L.Ed. 1509, 1514 (1944), citing as one of the enactments the 1939 amendment to Section 1 of the FELA.

[133]The first Railroad Retirement Act establishing a compulsory system of pension benefits for the employees of all interstate carriers was held unconstitutional in Railroad Retirement Board v. Alton R.R., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935). The argument was made that Congress undoubtedly had the power to adopt an exclusive system of workmen's compensation applicable to interstate carriers and that the Retirement Act was not distinguishable in principle. Mr. Justice Roberts went to some pains to dispose of the contention. 295 U.S. at 369-371, 55 S.Ct. at 771, 772, 79 L.Ed. at 1486, 1487. He said, *inter alia:* "In dealing with the situation it is permissible . . . to make the rule of compensation uniform throughout the field of interstate transportation, in contrast with inconsistent local systems. By the very certainty that compensation must be paid for every injury such legislation promotes and encourages precaution on the part of the employer against accident and tends to make transportation safer and more efficient." Mr. Chief Justice Hughes in his dissent on this point referred to the report of the Sutherland Commission, *supra* note 26, in which it was argued in favor of federal compensation that an employee, assured of compensation in case of injury or death, would be able to render better, more efficient and consequently safer service. 295 U.S. at 381-383, 55 S.Ct. at 776-777, 79 L.Ed. at 1492-1493.

[134]See the report of the Sutherland Commission, *supra* note 26.

result. Recently administrative studies along this line have been again ordered. On July 22, 1941, the Senate of the United States authorized the Railroad Retirement Board to make an investigation of the incidence of injuries and diseases incurred by employees through employment in the railroad industry and the social and economic consequences of the disabilities suffered.[135] As yet, no report of the investigation has been made to the Senate. Authoritative studies showing the present cost of industrial accidents to the railroads and their workers, the estimated cost of a workmen's compensation system, and the comparative advantages of the various systems of relief should furnish a sound foundation for legislative action providing a comprehensive system of workmen's compensation for railroad employees.

[135]See S. Res. No. 128, 77th Cong., 1st Sess., 87 CONG. REC. 6253 (1941) and SEN. REP. No. 561, 77th Cong., 1st Sess. (1941).

REGULATION OF INTERSTATE COMMERCE BY THE STATES: ACTION BY WILL OF CONGRESS

*J. A. Burkhart**

The once accepted pedagogical explanation of federalism—that the state and national governments operate in watertight compartments of distinct spheres of authority—is not very satisfactory as a statement of its present day status. Although most of us are familiar with the changing nature of the national government, few of us realize the corresponding growth which has taken place among the states. This growth has not violated the traditional federal pattern, but has evolved because of the expanding role which state governments have been called upon to exercise. In fact, rather than doing violence to our framework of government, the expansion of state power has had a rather salutary effect upon the pattern, since it has served, in a measure, to balance the tremendous expansion of federal power which has taken place in recent years.

Perhaps the trend among the states is best illustrated in matters relating to interstate commerce. Through the will of Congress, many circumstances have fallen under the scope of state power. On some occasions, when Congress has not legislated, the states have proceeded to act on the theory that silence gives consent. On other occasions Congress, by positive actions, has conceded that some local matters requiring diversity of treatment can best be regulated by the states. And on still other occasions activity has been encouraged by the joint action of the states and the federal government. Thus the states have acquired rather than lost authority in our changing federalism, and under these circumstances one could well argue that there are more states' rights today than ever before.

Since the Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"[1] the ultimate authority in all cases involving the commerce clause rests with Congress. However, the states have seen fit under certain conditions to exercise a considerable amount of regulatory power. Only occasionally have the states attempted to regulate interstate commerce per se, and then the legislation has been concerned with purely local situations. Generally the controversial issues arise from the conflict of state police powers with national power over interstate commerce.

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[1]U. S. CONST. Art. I, § 8.

Such a problem confronted the Supreme Court in the case of *Gibbons v. Ogden*.[2] Here the Court, after denying the argument that the states possessed concurrent commercial power, also disposed of the idea that state police power had jurisdiction when in conflict with congressional authority:

> . . . Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .[3]

Actually this was not a very clear cut decision on the status of state power, since Congress had already acted in this matter and the regulations which Congress had considered proper to make were in complete operation. Thus the questions of whether the states had any power at all, or whether the states had power until Congress saw fit to act were not discussed.

If the Court under Marshall had intended to hold in the case of *Gibbons v. Ogden* that the power of Congress over interstate commerce is exclusive, it backed down considerably in the case of *Wilson v. Black Bird Creek Marsh Co.*[4] The point at issue was whether a state could permit the damming of a navigable river. After pointing out the local aspects of the situation, the Court upheld the action of the state on the basis that the circumstances demanded diversity of treatment and did not conflict with any federal statute.[5]

To economize, Marshall felt that the power over interstate commerce resided exclusively with Congress, but that the states might make certain police regulations for the protection of their citizens where the effect on interstate commerce was only incidental.

Yet the controversy over the exclusive nature of the commerce clause was far from settled even at the end of Marshall's chief justiceship. When Taney succeeded Marshall, it was obvious that there remained a wide divergence of opinion in this matter among the judges of the Court. This was evident in *City of New York v. Miln*.[6] In this case the state statute required that the masters of all vessels landing immigrants had to file a

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[2] 9 Wheat. 1, 6 L.Ed. 23 (U.S. 1824).
[3] *Id.* at 210, 6 L.Ed. at 207.
[4] 2 Pet. 245, 7 L.Ed. 244 (U.S. 1829).
[5] *Ibid.*
[6] 11 Pet. 102, 9 L.Ed. 648 (U.S. 1837).

report with the mayor, giving information as to such persons. The majority opinion upheld the state statute as a rightful exercise of police power which did not conflict with any federal legislation. More indicative, perhaps, of unsettled status of state power in this field was the dictum expressed in a concurring opinion written by Justice Thompson, in which he states that it makes little difference whether the State is to be regarded as exercising its police or its commercial power. As long as there is no conflicting federal statute, the state statute is valid.[7]

Throughout the following years, the Court under Taney continued to be very favorable toward the power of the states. States' rights reached a high water mark in the *License Cases* which came before the Court in 1847.[8] In this instance the Court held that state statutes prohibiting the sale of liquor by unlicensed dealers could be applied to a retail dealer of foreign liquor and to an importer selling liquor imported from another state in the barrel in which it was imported.[9] Further, it was maintained that the police power of the states could in the silence of Congress be extended to prohibit sales of interstate imports even in the original packages. In other words, in the absence of an act of Congress the states could go so far as to prevent the sale of interstate imports even while these imports were in the original packages.[10]

Chief Justice Taney gave the doctrine of concurrent power in matters relating to commerce its strongest backing when he wrote:

> . . . its [state's] authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. . . . Upon this question the object and motive of the State are of no importance, and cannot influence the decision.[11]

As matters stood in the middle of the nineteenth century, there were two conflicting interpretations of the commerce clause as it affected state action. One of these, given ardent backing by Marshall, held that the power of Congress over interstate commerce was exclusive. The other doctrine, which received much impetus from Taney, held that the states had concurrent authority to legislate in the field of interstate commerce as long as there was not any conflicting legislation nor any constitutional infringement.

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[7] *Ibid.*
[8] 5 How. 504, 12 L.Ed. 256 (U.S. 1847).
[9] *Ibid.*
[10] *Ibid.*
[11] *Id.* at 583, 12 L.Ed. at 292.

The case which did much to clear the air by harmonizing these two positions was *Cooley v. Board of Wardens of the Port of Philadelphia.*[12] The state of Pennsylvania had enacted a law which required all ships entering the port of Philadelphia to engage a licensed pilot. This regulation applied to all vessels even though such vessels were engaged solely in interstate commerce. When the statute was contested before the Court on the ground that it infringed upon the exclusive power of the national government to regulate interstate and foreign commerce, the concurrent doctrine theory was given an acid test. If federal authority was exclusive, the Pennsylvania law would be clearly invalid. If, on the other hand, the state law was sustained it would appear that, to some extent at least, the states possessed concurrent power. The Supreme Court sustained the state statute by announcing that the regulation was of such specific and local character that the state might well legislate:

> Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . . That the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national. . .[13]

None the less, the Court did not omit pointing out the exclusive nature of congressional power:

> Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature to require exclusive legislation by Congress.[14]

Judging from this decision, it would seem that the regulation of interstate commerce fell in two categories: (1) When the regulations were national in character and required uniformity, the power of Congress was said to be exclusive. (2) When the regulations were local in character and Congress had not acted on the subject, the power of the states was said to be concurrent with that of Congress.

It was not long before the Court began to make serious reservations on the effect of the silence of Congress on state action. This was in tune with the general trend of Court decisions after the Civil War. Since the

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[12]12 How. 299, 13 L.Ed. 996 (U.S. 1851).

[13]*Id.* at 319, 13 L.Ed. at 1005.

[14]Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299, 13 L.Ed. 996 (U.S. 1851).

War delivered a knockout blow to the theory of state sovereignty, it was only logical that much of states' rights should have died with the wind. In 1887 the Court, after reiterating the doctrine set down in *Cooley v. Board of Wardens* that when regulations were local in character the states had concurrent power with that of Congress, stated:

> Another established doctrine of this Court is that, where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom.[15]

Of course one might raise the question of why the inaction of Congress was of any significance. Bringing this argument into the case does not seem to square with the logic of the opinion. Since Congressional power was exclusive there should be no question of sharing it with the states. It is hard to see why the Court did not hold that interstate commerce was a matter of national concern, and, consequently, the states would have no authority to act. In holding two conflicting principles (i.e., state regulation as held in *Cooley v. Board of Wardens* and exclusive authority of Congress even in the absence of Congressional action), the Court raised the dilemma of whether the lack of power on the part of the states to legislate in this matter resulted from the Constitution or from an implied conflict with the will of Congress? In this opinion the Court appeared to many to be skating on thin judicial ice.[16]

In the years immediately following the Civil War several states undertook the regulation of railroad rates. Some of these regulations fixed rates within the respective states while others set rates on interstate hauls. In the beginning the Supreme Court was inclined to look upon rate fixing as a local matter. However, it soon became apparent that continued state regulation was impossible in view of the increasing complexity of railroad management and service. The Supreme Court made this the telling point in the famous *Wabash* case,[17] which involved an Illinois statute prohibiting the charging of a rate within the state as high as rates for a longer distance anywhere on the lines of the same road. Since the Wabash Railroad had lines outside as well as inside the state, the statute had the effect of regulating interstate railroad rates. In its decision the

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[15]Robbins v. Shelby County Taxing District, 120 U.S. 489, 493, 7 S.Ct. 592, 30 L.Ed. 694, 696 (1887).

[16]See Bikle, *The Silence of Congress* (1927) 41 HARV. L. REV. 200.

[17]Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244 (1886).

Court invalidated the state statute on the grounds that the fixing of interstate railroad rates was not a local matter, but one of national concern and therefore a subject only for Congressional action.[18]

Although the states have been eliminated from the field of fixing railroad rates, there are still many aspects of railroad regulation which come under state jurisdiction. The Court, for example, has upheld state control on matters regarding examinations for locomotive engineers,[19] supervision of local service performed by interstate railroads,[20] speed limitations within cities,[21] and the elimination of grade crossings.[22] Likewise, state authority over highways and water travel is almost so extensive as to defy analysis.[23] A few illustrations will suffice.

As recent as 1938, for example, the Supreme Court upheld a state statute prohibiting the use on state highways of motor trucks whose width exceeded ninety inches, six inches less than standard width, or whose weight exceeded 20,000 pounds. The decision was based on a careful review of state authority to control the use of its own highways, as well as the Court's approval of a wide scope of legislative discretion to establish forms of regulation not clearly arbitrary.[24]

The opinion in *Maurer v. Hamilton*[25] was much in the same trend. Here the Court sustained a state statute which prohibited the operation on state highways of any vehicle carrying another vehicle above the cab or above the driver of the carrier vehicle. This decision was given added significance since the Interstate Commerce Commission, which was given regulatory power by the Motor Carrier Act of 1935, had found that such vehicles did not constitute a direct threat to public safety on the highways. Nevertheless, the Court reinforced the state's position by saying:

> As a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power

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[18]*Ibid.* This decision prompted the establishment of the I.C.C.

[19]Smith v. Alabama, 124 U.S. 465, 8 S.Ct. 564, 31 L.Ed. 508 (1888).

[20]Missouri Pacific Ry. Co. v. Larabee Flour Mills, 211 U.S. 612, 29 S.Ct. 214, 53 L.Ed. 352 (1909).

[21]Erb v. Morasch, 177 U.S. 584, 20 S.Ct. 819, 44 L.Ed. 897 (1900).

[22]Erie R. Co. v. Board of Public Utility Com'rs, 254 U.S. 394, 41 S.Ct. 169, 65 L.Ed. 322 (1921).

[23]Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L.Ed. 244 (U.S. 1829), in which the state was permitted to dam a navigable river; Port Richmond & Bergen Point Ferry Co. v. Hudson County, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330 (1914), in which the state was permitted to regulate one-way fares on interstate ferry; Kane v. State of New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916), in which the state was permitted to license non-resident motorists using highways and to register their machines.

[24]South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938).

[25]309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969 (1940).

> is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose.[26]

In *H. P. Welch Co. v. New Hampshire*[27] the problem of whether state regulation of highways and, consequently, of persons and vehicles engaged in interstate commerce automatically ceases with the passage of an Act of Congress, was brought before the Court. The case arose over the validity of a New Hampshire statute prohibiting any driver to operate, or any owner to require a driver to operate, a vehicle for more than twelve hours of continuous driving, in view of the passage of the Motor Carrier Act of 1935. Acting under Federal authority the Interstate Commerce Commission set ten consecutive driving hours as the maximum but had postponed the effective date of the new regulations. The point at issue was whether, after the passage of the Act of Congress, state regulations were still in effect. The Supreme Court, in sustaining the state statute, concluded that there is need for the local supervision of the operation of motor vehicles and that Congress by a mere grant of power to Interstate Commerce Commission did not intend to supersede state police regulations.[28]

A 1907 State of Washington statute, relating to the inspection and regulation of motor-driven vessels, was challenged in 1937 by the owners of a group of motor-driven tugs. The owners sought a writ of prohibition against the enforcement of the 1907 statute, on the ground that the law was an infringement on federal control of interstate and foreign commerce. In holding the state statute valid, the Supreme Court made an interesting observation on state legislative discretion: "When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess."[29]

Broadly speaking, the trend of Supreme Court decisions since the Civil War has been in the direction of limiting states' rights. In recent years, however, it appears as if the Court is more sympathetic toward state action as long as such action does not drastically invade congressional prerogatives. In 1927 the Court held as an infringement on Congressional power over foreign commerce a Pennsylvania statute requiring steamship ticket agents to be bonded to protect the public against fraud.[30]

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[26]*Id.* at 614, 60 S.Ct. at 734, 84 L.Ed. at 980.

[27]306 U.S. 79, 59 S.Ct. 438, 83 L.Ed. 500 (1939).

[28]*Ibid.*

[29]Kelly v. State of Washington *ex rel* Foss Co., 302 U.S. 1, 14, 58 S.Ct. 87, 94, 82 L.Ed. 3, 13 (1937).

[30]Di Santo v. Commonwealth of Pennsylvania, 273 U.S. 34, 47 S.Ct. 267, 71 L.Ed. 524 (1927).

However, a few years later this decision was squarely overruled in *California v. Thompson.*[31] The *California* case questioned the constitutionality of a state statute which regulated the business of agents who sell "transportation over the public highways of the state."[32] The keystone of the Court's opinion which sustained the state law was based on the absence of restrictive congressional legislation plus the fact that the act did not obstruct or burden interstate commerce.[33]

> In any case until Congress undertakes its regulation we can find no adequate basis for saying that the Constitution, interpreted as a working instrument of government, has foreclosed regulation, such as the present, by local authority.[34]

Another approach to enlarging the areas of State legislation is through the joint action of Congress and the state legislatures. Perhaps the best illustration of this procedure can be found in the experience of the states in attempting to prohibit the interstate shipment of intoxicating liquor. When the constitutionality of state regulations to this end were contested, the Court, following the doctrine of the "original package," held that a state could not prohibit "original package" sales of liquor imported from another state.[35] Such prohibition infringed upon the exclusive power of Congress:

> . . . inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.[36]

Nevertheless, the Court, speaking parenthetically, did invite state regulation through congressional sanction:[37]

> . . . a state may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, *unless placed there by Congressional action.*[38] (Italics added)

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[31]313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219 (1941).
[32]*Id.* at 111, 61 S.Ct. at 931, 85 L.Ed. at 1220.
[33]California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219 (1941).
[34]*Id.* at 115, 61 S.Ct. at 933, 85 L.Ed. at 1222.
[35]Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1890).
[36]*Id.* at 109, 110, 34 L.Ed. at 132.
[37]An interesting case with similar implications is Pennsylvania vs. Wheeling & Belmont Bridge Co., 18 How. 421, 15 L.Ed. 435 (U.S. 1856), where the Court held that the state could not permit the construction of a bridge over the Ohio River. However, the Court reversed itself when Congress gave consent to state action.
[38]Leisy v. Hardin, 135 U.S. 100, 108, 34 L.Ed. 128, 132 (1890).

Congress quickly accepted the invitation to act by passing the Wilson Act of 1890 which subjected imported liquor to the police power of a state regardless of the form of the package.[39] When a state law written under the terms of the Wilson Act was contested, the Supreme Court upheld its validity.[40]

At the time there was much dissent over the apparent contradiction of the Court's stand, but on examination the conflict between the decision in *Leisy v. Hardin* and *In re Rahrer* is more apparent than real. The inconsistency of the sharing of power, allowed in *In re Rahrer* but denied in *Leisy v. Hardin,* may be explained by the Court's decision to uphold state police laws which have the consent of Congress. However, it appears the Court felt that the states, irrespective of congressional legislation, could not share in the strictly commercial power. Hence as the cases finally evolved, the states under the authority of their police power could deal with almost any matter of interstate commerce provided Congress gave its consent.

The Wilson Act did not give the states police power over intoxicants until they had already been transported and delivered to the consignee. Thus possession and right to use the imported liquor was still protected by the commerce power,[41] and a booming mail order business in intoxicating liquor threatened to nullify state attempts at prohibition.

To clear up the inadequacies of the Wilson Act, Congress in 1913 passed the Webb-Kenyon Act. Under the terms of this statute the shipment of intoxicants, when intended to be used in violation of state laws, was forbidden.[42] Subsequently, when the constitutionality of a state law prohibiting the shipment of liquor into the state from outside areas was challenged, the Supreme Court sustained both the state and federal laws.[43]

Federal and state co-operation in prohibiting the transportation of intoxicants in interstate commerce was further increased by the passage of the Reed Amendment in 1917.[44] This statute forbade the transportation of liquor, except for specific purposes, into any state which prohibited its manufacture and sale. In *United States v. Hill* the federal statute was upheld and the prevailing opinion expressed pointedly the value and nature of state and federal co-operation:

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[39]26 STAT. 313 (1890), 27 U.S.C. § 121 (1934).
[40]*In re* Rahrer, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572 (1891).
[41]Rhodes v. Iowa, 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088 (1898).
[42]37 STAT. 699 (1913), 27 U.S.C. § 122 (1934).
[43]Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A. 1917B 1218, Ann.Cas. 1917B 845 (1917).
[44]39 STAT. 1058, 1069 (1917), 27 U.S.C. § 123 (1934).

> Congress may exercise this authority in aid of the policy of the State, if it sees fit to do so. . . . Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between local and national forces of government to the end of preserving the rights of all. . .[45]

Subsequent developments in the state regulation of the interstate shipment of liquor include a statute of Arkansas making it illegal for a person to ship liquor into the state without first having secured a permit from the state commissioner of revenue and paid a nominal fee. In *Duckworth v. Arkansas*[46] the Court found that the law was a logical means of establishing the identity of the shipper and did not impede the interstate transportation "more than is reasonably necessary."

Following the same pattern but going somewhat further was a Virginia statute requiring a bond signed by a responsible person for liquor shipped through the state in interstate commerce, and prohibiting the shipment except upon evidence that the liquor is to be lawfully delivered at its place of consignment. In *Carter v. Virginia* the Court asserted, "It is enough that Virginia could conclude, in the absence of contrary Federal regulation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws and the laws of a neighboring state."[47]

The dual nature of our government presents on occasion the possibility of national power stalemating state action and of state power preventing national action. In order to avoid this deadlock federal-state co-operation has been used to enlarge the activities of both agencies. Moreover, the Court has upheld in a number of occasions the validity of co-operative action in fields in which either government would be powerless to act as a single unit. This procedure was given important potentialities as the result of *Whitfield v. Ohio*.[48] Up to that time it was felt that the power of congressional exclusion of articles from interstate commerce could be exercised only as to items which were immediately harmful to the user, such as adulterated foods[49] and misbranded articles.[50] Such articles were considered inherently harmful and were not regarded as legitimate articles of trade. The opinion in *Whit-*

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[45]248 U.S. 420, 425, 426, 427, 63 L.Ed. 337, 340, 341 (1918).
[46]314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294 (1941).
[47]321 U.S. 131, 137, 138, 64 S.Ct. 464, 468, 88 L.Ed. 605, 611 (1944).
[48]297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778 (1936).
[49]Hipolite Egg Co. v. U.S., 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364 (1911).
[50]Seven Cases v. U.S., 239 U.S. 510, 36 S.Ct. 190, 60 L.Ed. 411, L.R.A. 1916D 164 (1916).

field v. Ohio[51] was a departure from this principle since the articles concerned, convict-made goods, were only indirectly harmful to the user. The case arose out of an Ohio statute which was written under the provisions of the Hawes-Cooper Act.[52] This act provided that all goods manufactured by convicts and transported to any state shall be subject to the laws of such state just as though the goods had been manufactured there. When the Ohio statute, prohibiting sale in the open market of convict-made goods, was brought before the Supreme Court, both federal and state laws were sustained.[53]

Following the pattern of the Wilson-Webb-Kenyon Acts, Congress passed the Ashurst-Sumners Act of 1935 which prohibited the transportation of convict-goods into a state for purposes contrary to its laws.[54] In *Kentucky Whip and Collar Company v. Illinois Central R. Co.*[55] the Court upheld unanimously the validity of the federal statute, stating that Congress could use its regulating powers over interstate commerce in such a way as to prevent that commerce from nullifying state policy.

Some interesting cases have arisen out of *United States v. South-Eastern Underwriters Association*[56] in which the sale of insurance was held to come within the category of interstate commerce. While space does not permit a detailed examination of attempts made by the states to continue to regulate such commerce, a passing acknowledgment of this development is pertinent to the general topic.

On June 3, 1946, the Supreme Court decided two cases, *Prudential Insurance Co. v. Benjamin*[57] and *Robertson v. California,*[58] involving problems dealing with state taxation and regulation of the insurance business in view of its status under the *South-Eastern Underwriters* case. In *Robertson v. California* the contention was advanced that the *South-Eastern Underwriters* case had granted immunity from state regulation for the business of insurance. The appellant in the case had been convicted in a state court for the violation of a California statute which required insurance agents to be licensed by designated authority, and prohibited them to act for a non-admitted insurer except in the case of specially licensed "surplus line brokers."[59] The Court felt that the regu-

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[51]297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778 (1936).
[52]45 STAT. 1084 (1929), 49 U.S.C. § 60 (1934).
[53]Whitfield v. Ohio, 298 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778 (1936).
[54]49 STAT. 494 (1935), 18 U.S.C.A. § 396b-396d (Supp. 1945).
[55]299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270 (1937).
[56]322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).
[57]66 S.Ct. 1142 (U.S. 1946).
[58]66 S.Ct. 1160 (U.S. 1946).
[59]*Id.* at 1161.

lations were reasonable and that the regulation "neither discriminates against nor substantially obstructs the commerce."[60] Asserting that the California statute set up a form of licensing, the Court continued, "we are far beyond the time when, if ever, the word 'license' per se was a condemnation of state regulation of interstate business done within the state's borders."[61]

In *Prudential Insurance Co. v. Benjamin* the Court unanimously sanctioned a statute of South Carolina which imposed upon foreign insurance companies a tax of three per cent of the aggregate of premiums received from insurance business done within the state, without reference to the interstate or local character of the business. Insurance companies of South Carolina were not required to pay this tax. Prudential claimed that such a tax was discriminatory and in light of previous decisions from *Welton v. Missouri*[62] to *Nippert v. Richmond*,[63] invalidating state taxes discriminating against interstate commerce, the South Carolina statute must likewise be invalid. However, the Court points out that such cases of discrimination arose in the silence of Congress, but that in this case Congress had acted affirmatively in the McCarran Act of 1945 which subjected the business of insurance to the laws of the several states.[64] In keeping with previous patterns the Court emphasized that whenever "Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' express approval."[65]

The possibilities of federal-state action are important when one considers that in *Hammer v. Dagenhart*[66] the Court denied the right of Congress to prohibit the transportation of child labor products in interstate commerce. Neither have the states been able to legislate in this field. Thus there exists a void between state and federal powers. A statute like the Webb-Kenyon Act or the Hawes-Cooper Act would, if upheld, do much to eliminate this void. Such a solution might prove to be a practical means of meeting many problems which neither the states nor the national government can solve alone. By partially filling "the twilight zone" in state and national commerce powers, one increasing failure of our present federal system would be eliminated. Finally, in addition to

[60] *Id.* at 1165.
[61] *Id.* at 1170.
[62] 91 U.S. 275, 23 L.Ed. 347 (1876).
[63] 66 S.Ct. 586 (U.S. 1946).
[64] Prudential Insurance Co. v. Benjamin, 66 S.Ct. 1142 (U.S. 1946).
[65] *Id.* at 1152.
[66] 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 101, 3 A.L.R. 649, Ann.Cas. 1918E 724 (1918).

strengthening states' rights by increasing fields of state participation, federal enabling acts have the merit of working within the constitutional framework by respecting the rights and position of each individual state.

In summary, state power over matters pertaining to interstate commerce has been exercised in a number of ways: (1) State action has been upheld in matters requiring diversity of treatment when Congress had not acted and there were no constitutional infringements; (2) state action has been sustained in matters of national concern when state legislation did not conflict with the Will of Congress; (3) state action has been held valid in matters of national concern when Congress has given its consent either directly or indirectly; (4) in matters affecting both local and national interests, co-operative action by both governments has been sustained.

In general it may be said that in recent years there has been a trend in judicial decisions to uphold the position of the states in regulating matters pertaining to interstate commerce if the circumstances involved require, to any conceivable degree, a diversity of treatment. This in some respects is decidedly away from the holdings of John Marshall and is distinctly towards the acceptance of state legislative discretion. So unmistakable has this trend been that one writer on constitutional questions has stated:

> Whatever the outcome it is clear that in the interstate field the judicial function is now definitely challenged. Forces are at work in the Court which have already reduced and perhaps may ultimately deny the power of the Court to render decisions under the commerce clause as checks on state action.[67]

Admittedly, the above presentation of the status of states' rights is one-sided. It is true that one could easily find an equal, or perhaps even greater, number of cases where state legislative discretion has been reversed. Nevertheless, the very fact that the Supreme Court has upheld so many cases of state regulation on matters pertaining to interstate commerce may be indicative of a growing trend. At least, the thesis presented is a good antidote to the uncritical assumption that unilateralism has replaced multilateralism as the principle element in our federal system.

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[67] Dowling, *Interstate Commerce and State Power* (1940) 27 VA. L. REV. 1.

RECENT MISSISSIPPI OIL AND GAS CASES*

John W. Wade†

Introduction

The March, 1941, issue of the *Mississippi Law Journal* contained a symposium on the Law of Oil and Gas, containing some eight leading articles.[1] But in many respects the two student notes in this issue were of more importance to the lawyers of the State than the leading articles.[2] Clearly and lucidly, these notes analyzed the few Mississippi cases on the subject, showed how they fitted into the body of law which had been developed in other jurisdictions and indicated the probable course of future development.

There were not many cases which had been decided at the time. They include *Moss v. Jourdan,*[3] *Stern v. Great Southern Land Co.,*[4] *Stokely v. State* ex rel. *Knox,*[5] and *Gulf Refining Co. v. Terry.*[6] From these and certain of the timber-lease and turpentine-lease cases, conclusions were drawn. Perhaps the most important conclusions were two: (1) that Mississippi follows the absolute-ownership theory in regard to the nature of a landowner's interest in oil and gas, and (2) that Mississippi adopts the Texas view as to the effect of an "oil and gas lease," that it operates as a present conveyance of a corporeal estate in the oil and gas in place, amounting to a determinable fee. I shall not attempt to discuss these early cases in detail but shall make my discussion a supplement to those two notes. Since March of 1941 there have been over thirty cases which have affected the law of oil and gas in Mississippi. I propose now to consider them.

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[1]Merrill, *The Evolution of Oil and Gas Law* (1941) 13 Miss.L.J. 281; Walker, *Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligation of The Lessee, id.* at 292; Blake, *Oil Royalties: A Suggested Criterion, id.* at 307; Daggett, *Royalty in Louisiana, id.* at 323; Roberts, *Dower Rights Under Oil* and *Gas Leases, id.* at 342; Moses, *The Constitutional, Legislative and Judicial Growth of Oil and Gas Conservation Statutes, id.* at 353; Hardwicke, *Oil Conservation: Statutes, Administration and Court Review, id.* at 381; Summers, *The Rowan & Nichols Cases, id.* at 417.

[2]Stevens, *Property Rights in Oil and Gas in Mississippi* (1941) 13 Miss.L.J. 427; Wells, *Capacity Necessary to Execute an Oil and Gas Lease in Mississippi, id.* at 453. See Watkins, *A New Legal Classification in Mississippi Jurisprudence* (1931) 3 Miss. L.J. 171, for an earlier treatment.

[3]129 Miss. 598, 92 So. 689 (1922).

[4]148 Miss. 649, 114 So. 739 (1927).

[5]149 Miss. 435, 115 So. 563 (1928).

[6]163 Miss. 869, 142 So. 457 (1932).

In most branches of the field the development of the law has been remarkably orderly. The Mississippi Court has had before it the experience of courts in other states which have had to pioneer in the development of the law of oil and gas. Where the Mississippi law is clear, I shall not need to do much more than arrange and digest the cases and indicate a few questions which may arise from the decisions. In other places more detailed discussion seems warranted. Perhaps the fullest discussion is required in two branches of the field where it impinges upon other fields of the law, taxation and administrative law. These two topics will be reserved for the last.

Nature of Landowner's Interest

The conclusion that Mississippi follows the absolute-ownership rather than the qualified-ownership theory has been vindicated by the later cases. They make it clear that the landowner has complete ownership of the minerals underneath his land, and that he may sell the oil and gas as such, transferring a fee simple to it.

In *Cook v. Farley*,[7] the Court declared that when a landowner makes a grant of the land, retaining ownership of the minerals, he does this by means of an exception rather than a reservation. A separate estate is created in the minerals—by a legal exception, since they are already in existence. Technically, a reservation applies to the creation of an interest which has no previous existence—such as an easement or profit. The Court is therefore clearly holding that a mineral deed or exception creates ownership in the minerals as such, not just a profit or exclusive right to obtain the minerals. Subsequent decisions are in accord. Particular reference may be made to *McNeese v. Renner*,[8] which indicates that the same effect is created by a "retention" of "an undivided one-fourth in and to all minerals, oil and gas that might hereafter be discovered." A present ownership exists, and the words "that might hereafter be discovered" are immaterial.

Wight v. Ingram-Day Lbr. Co.[9] holds that persons holding undivided interests of oil and gas in place are tenants in common of a freehold, as that term is used in the statute providing for partition. This is in accord with the earlier case of *Stern v. Great Southern Land Co.*,[10] but the *Wight* case now holds that there are occasions when the mineral interests can be partitioned in kind, such as when no oil or gas is known

[7] 195 Miss. 638, 15 So.(2d) 352 (1943).
[8] 197 Miss. 203, 21 So.(2d) 7 (1945); *cf.* Liverpool & London & Globe Ins. Co. v. Delaney, 190 Miss. 404, 200 So. 440 (1941).
[9] 195 Miss. 823, 17 So.(2d) 196 (1944).
[10] 148 Miss. 649, 114 So. 739 (1927).

to exist in the immediate locality and there is no reason to suppose that one acre is more valuable than another. To this extent the *Stern* case is overruled. The present position is in accord with the weight of authority.

Cook v. Farley,[11] already mentioned, raises the question of adverse possession of sub-surface minerals. Adverse possession of the surface includes adverse possession of the minerals when the two have not been separated. But when the estates have been separated, the *Cook* case holds that adverse possession of the surface, even with color of title to the whole, will not ripen into title to the minerals. To quote the opinion:

> Where there has been a severance of the surface and mineral estates, the authorities uniformly hold that adverse possession must consist of actually taking possession of the minerals by drilling wells or digging mines and capturing or taking possession of the minerals, either by producing and removing them or by holding them capped in a completed well to the exclusion of the mineral title-holder and the world, for the statutory period of adverse possession.[12]

This indicates that what is lacking is the element of possession rather than the adverse character of the holding. It means that even an express statement to the owner of a separate mineral estate that one claimed both estates under his color of title would be ineffective. Suppose that the surface owner started drilling for oil. Does adverse possession not begin until he actually finds it? A literal interpretation of the quotation would require an affirmative answer.

There have been no decisions in Mississippi on the problem of drainage as between adjoining owners; but the question of surface damage to an adjoining landowner was raised in *Johnson v. Sowell*.[13]

Nature of Lessee's Interest

Back in 1928, the *Stokely* case[14] had indicated that Mississippi would adopt the Texas view as to the nature of the interest which an ordinary oil and gas "lease" creates in the lessee instead of following the majority view that he obtains a profit a prendre. As Judge Cook there explained, the lease vested title to seven-eighths of the oil in the lessee. The leading Texas case of *Stephens County v. Mid-Kansas Oil & Gas Co.*[15] was cited

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[11]195 Miss. 638, 15 So.(2d) 352 (1943), cited *supra* note 7.

[12]*Id.* at 655, 15 So.(2d) at 357. See also Levy v. Campbell, 28 So.(2d) 224 (Miss. 1946); *cf.* Douglas v. Skelly Oil Co., 28 So.(2d) 227 (Miss. 1946).

[13]15 So.(2d) 688 (Miss. 1944), not off. rep.

[14]Stokely v. State *ex rel.* Knox, 149 Miss. 435, 115 So. 563 (1928).

[15]113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566 (1923).

with approval and was the only case so cited. Though the court did not expressly use the term "determinable fee," the description of the nature of the interest was such as to permit the law journal note to assert that they were the same. The assertion has been justified by more recent cases.

In *Pace v. State* ex rel. *Rice,*[16] decided in 1941, the Court indicated that a "lease" amounted to a sale of the minerals. For our present purposes the case has no other importance.

In October of the same year, Judge McGehee, in the case of *Lloyd's Estate v. Mullen Tractor and Equipment Co.,*[17] declared expressly that the interest created in the lessee was "in the nature of a determinable fee," citing the *Restatement of Property.* He then quoted from the *Stokely* case, and cited the *Stephens County* case as holding

> . . . that the ordinary lease operates as a present conveyance of a corporeal estate in the oil and gas in place; and that since the lessee's interest might endure forever, and at the same time is automatically terminated upon the happening of certain events specified in the lease, the estate created is a determinable fee.[18]

His next sentence, starting off with the words, "This being true . . ." indicates that the holding is being adopted; and would apparently eliminate all doubt in the matter. Based on this viewpoint, the Court proceeded to hold that the lease did not violate the Rule against Perpetuities in permitting the lessee to pay delay rentals for an indefinite period, rather than confining him to the so-called primary term of five years. The lessee's interest was presently existing and the Rule against Perpetuities did not apply. Although leases of this particular type are not universally upheld, the holding in the *Lloyd* case is in accord with the Texas decisions and the majority holding.

In April of the current year, Judge McGehee cited the *Lloyd* case and certain Texas cases as authority for the statement that the lessee had a determinable fee. Some of the other language in this case, *Koenig v. Calcote,*[19] appears somewhat inconsistent, however. After executing an oil and gas lease, the owner had given a mineral deed, including half of the "oil royalty and gas rental . . . and in event that the . . . lease for any reason becomes canceled or forfeited," half of all the minerals. In discussing the validity and present effect of the deed, the Court said:

> The lease was not canceled or forfeited by reason of a failure to pay the annual rental, but it was canceled and forfeited, or at

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[16]191 Miss. 780, 4 So.(2d) 270 (1941).
[17]192 Miss. 62, 4 So.(2d) 282 (1941).
[18]*Id.* at 84, 4 So.(2d) at 288.
[19]25 So.(2d) 763 (Miss. 1946).

> least forfeited by the failure of the lessee to have the land in production at the expiration of the ten-year primary period and by its failure to be then engaged in conducting any drilling operations thereon. . . . Therefore, the lessee forfeited its right under the lease by reason of the fact that a producing well was not in existence at the expiration of the primary term.[20]

The inconsistency lies in the use of the term "forfeited." A forfeiture takes place in connection with an estate subject to condition subsequent, not a determinable fee. The latter is subject to a special limitation and may expire *ipso facto,* but is not forfeited. The difference is more than just one of words. With a fee determinable, the various equitable doctrines of forfeiture are not applicable; in addition, since the interest expires *ipso facto,* the limitation cannot be waived, and no action on the part of the lessor is required.

I would surmise that the Court did not intend to use the word "forfeited" in a technical sense in this opinion, but that it used the word in a broad, loose sense under the feeling that this was the sense in which it was used in the mineral deed. When a holding directly on the point is required, I think it safe to predict that the Court will hold that the interest expires by special limitation.

Throughout these several cases, from the *Stokely* case on, the position has been that the estate is in the oil and gas in place, as such. Possible indications to some other effect from certain recent taxation cases will be considered later. I do not believe, however, that the tax cases will affect the holdings just discussed.

The *Stokely* case had stated that the lessee owns 7/8 of the oil in place. Subsequent decisions have called the lessee's interest a determinable fee, but have not indicated whether it is in all of the oil and gas or in 7/8 of it. This factor may be considered in connection with the next topic.

Nature of Lessor's Interest

After a lease has been executed, what interest does the lessor retain? In the two recent cases of *Armstrong v. Bell*[21] and *Koenig v. Calcote,*[22] Judge McGehee has carefully explained that he has three interests:

> . . . first, a reversionary fee interest in the oil, gas and other minerals, . . . second, the right to receive the rentals and

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[20] *Id.* at 766.
[21] 24 So.(2d) 10 (Miss. 1946).
[22] 25 So.(2d) 763 (Miss. 1946).

royalties during the life of the lease, and third, the fee-simple title to the soil.[23]

The last of these, the title to the soil, is clear enough and needs no further consideration. The first, the reversionary fee interest, does not appear to have been anywhere further defined by the court. If what the lessee has is a determinable fee in the oil and gas, then the corresponding reversionary interest is known as a right of reverter. At common law this interest was not assignable, but the Court has expressly declared that it, "or any part thereof, is capable of conveyance apart from the ownership of the land."[24]

It is the remaining interest, "the rentals and royalties," concerning which most difficulties may arise. That unaccrued royalties are an interest in real property is indicated by the opinion in *Merrill Engineering Co. v. Capital National Bank.*[25] It is also indicated by the holding in *Armstrong v. Bell* that a bill to quiet title in a royalty interest might be maintained. Is the interest corporeal or incorporeal? A consideration of this question suggests that the analysis originally quoted may not be entirely accurate or complete. In the *Stokely* case, the Court declared that the oil lease gave the lessee title to 7/8 of the oil *in situ.* This statement carried with it the necessary implication that the lessor retained title to 1/8 of the oil in place. Subsequent discussions of the nature of the interests of the lessor and lessee, as we have seen, have stated that the lessee has a determinable fee in the oil and gas but have failed to say whether it is in all of the minerals or in a fractional portion of them.

The Texas decisions, on which the general Mississippi theory seems to be based, draw a distinction depending upon the wording of the royalty clause. If the royalty is payable in kind (or in kind or money at the option of the lessor), they hold that he owns the corresponding fraction of the mineral in place; if it is payable in money (or in money or kind at the option of the lessee), he does not own any of the mineral in place but is entitled only to the royalty. In the former case, the interest may be regarded as corporeal; in the latter it would appear to be incorporeal. Whether the Court will follow the Texas distinction is not certain. The *Stokely* case would suggest that it will. Indications elsewhere, particularly in the *Armstrong* and *Koenig* cases, are that it may not. The Texas

[23]Koenig v. Calcote, 25 So.(2d) 763, 765 (Miss. 1946). The language in *Armstrong v. Bell* is: "Therefore, there was left to the grantor Bell only the fee simple title to the soil, the right to receive the rentals and the 1/8th royalty if production was had under the lease, and the reversionary interest in the minerals in place if the lease expired by its terms or was permitted to lapse." 24 So.(2d) 10, 12.

[24]Koenig v. Calcote, 25 So.(2d) 763, 766 (Miss. 1946).

[25]192 Miss. 378, 5 So.(2d) 666 (1942).

courts appear to have had no little difficulty in applying the distinction and it does not appear to have been very helpful. Probably it would be just as well to hold that the lessee obtains a determinable fee in 8/8 of the oil and gas unless the granting clause itself states that a smaller fraction is conveyed. There is no reason why rents or royalties cannot be payable in kind without changing the nature of the interest.

A discussion of the royalty interest would not be complete without referring to the opinion in *Smith County Oil Co. v. Board of Supervisors of Simpson County.*[26] In holding that a royalty interest cannot be the subject of an ad valorem tax, it stated that after giving a lease, an owner has left either (1) ownership of the entire interest in the minerals, (2) ownership of an eighth interest in the minerals, or (3) "simply a royalty of an undivided one eighth when, but not until, discovered and raised to the surface."[27] The Court found no reason to decide between the three, since it regarded the interest as not subject to assessment in any case. Clearly, however, the lessor does not have ownership of the entire interest in the minerals unless the previous cases regarding the effect of a lease are overruled and it is held that the lease creates only a profit. The language of the *Stokely* case would suggest that the second alternative is correct. If the third alternative is adopted, a later sentence in the opinion declares that "If all that appellant had left was a royalty in the minerals when produced this does not become assessable ad valorem until produced and brought to rest upon the surface."[28] It would be a mistake to regard this sentence as an indication that an interest in unaccrued royalties is not a presently existing interest in real property. The opinion in this case did not attempt to analyze very completely the nature of the royalty interest, and the case is not likely to prove influential on oil and gas problems outside the tax field.

Construction Problems

Quite a number of cases have involved problems of construing different kinds of instruments involving oil and gas—mineral deeds, oil and gas leases, deeds to the surface estate, royalty transfers, pooling agreements, division orders, etc. It is not possible to consider each of these cases individually, but some classification and general remarks may be made about them.

Cook v. Farley,[29] for example, is the outstanding case involving a conveyance of land in which the grantor seeks to retain the mineral estate

[26] 25 So.(2d) 457, *sug. error overr.*, 26 So.(2d) 685 (Miss. 1946).
[27] 25 So.(2d) at 457.
[28] *Ibid.*
[29] 195 Miss. 638, 15 So.(2d) 352 (1943).

or an undivided portion of it. The case clearly explains that this is an exception rather than a reservation, although the word used in the deed is not material. The case adds that a statement in the deed that the mineral esate is being reserved for a third person does not have the effect of conveying title to him.

Richardson v. Moore[30] and *Fatherree v. McCormick*[31] both involve the general situation arising when a man who has had property conveyed to him with certain mineral exceptions or reservations subsequently himself conveys it, using the same description, including the language originally used for the reservation. Does he intend to convey exactly what he received or to retain for himself certain mineral rights? In both cases, the court decided on the first intention; but the question is always a difficult one caused by careless conveyancing.

In *McNeese v. Renner,*[32] language retaining a one-fourth interest in minerals "that might be hereafter discovered" was held to amount to an exception, the quoted phrase being superfluous. This case also explains that whenever the mineral estate is separated from the surface estate, there is an implied easement to use the surface in a reasonable manner to obtain the minerals. This easement need not be express.

The several cases involving an exception of an undivided mineral interest are to be contrasted with *Armstrong v. Bell,*[33] where the language was held to create a perpetual non-participating royalty. Compare the similar interest now required by statute to be retained by the state on sale of tax forfeited lands.[34] See also *Koenig v. Calcote,*[35] where a mineral deed conveyed half of the minerals, subject to a presently existing lease, and included also half of the royalties under the present or any subsequent lease.

In *Merrill Engineering Co. v. Capital National Bank,*[36] it was stated that when a lessor conveys his surface interest without making reference to the royalties or the reversionary interest in the minerals, they are included too.

Several general rules of construction have been resorted to on occasion. Thus, *Cummings v. Midstates Oil Corp.*[37] illustrates the effect given to the practical interpretation of the parties in resolving conflicting

[30]198 Miss. 741, 22 So.(2d) 494 (1945).
[31]24 So.(2d) 723 (Miss. 1946).
[32]197 Miss. 203, 21 So.(2d) 7 (1945).
[33]24 So.(2d) 10 (Miss. 1946).
[34]Miss. Laws 1946, c. 421.
[35]25 So.(2d) 763 (Miss. 1946).
[36]192 Miss. 378, 5 So.(2d) 666 (1942).
[37]193 Miss. 675, 9 So.(2d) 648 (1942).

clauses. The granting clause and the expression of intention thereafter conflicted in the case. *Allen v. Boykin*[38] and several other cases illustrate the rule that a deed will be construed to favor the grantee, if there are no other indications of the intent of the parties. The *Allen* case also held that the words "acquit back" constitute words of conveyance in a mineral deed.

A number of cases construe provisions of an oil and gas lease. *White v. Hunt*[39] and *McCubbins v. Morgan*[40] involve construction of the "unless" type of clause in connection with payment of delay rentals which is found in most modern leases. They agree that this type of clause imposes no duty upon the lessee to pay rentals, but simply provides that his lease will expire unless he does pay or start drilling. *Lloyd's Estate v. Mullen Tractor & Equipment Co.*,[41] previously considered, discusses implied covenants in oil and gas leases and holds that a covenant will not be implied in contravention of an express provision.[42] The case involves a clause allowing payment of delay rentals for an indefinite period. *Simpson v. United Gas Pipe Line Co.*[43] construes a royalty clause providing for one-eighth of the value of the gas "calculated at the rate of the market price."

A pooling agreement entered into after several leases had been given is considered in *Merrill Engineering Co. v. Capital National Bank.*[44] A division order is involved in *Simpson v. United Gas Pipe Line Co.*[45]

Reference may be made here to *Sample v. Romine,*[46] which involves a joint adventure for the purchase of oil and gas leases, and the requirement of the statute of frauds that the provisions be in writing. The resulting trust device was used to avoid the provisions of the statute of frauds.

Problems in connecion with cancellation for fraud are raised in several recent cases.[47]

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[38]24 So.(2d) 748 (Miss. 1946).

[39]193 Miss. 742, 10 So.(2d) 539 (1942).

[40]23 So.(2d) 926 (Miss. 1945); *cf.* Chism v. Hollis, 152 Miss. 772, 118 So. 713 (1928).

[41]192 Miss. 62, 4 So.(2d) 282 (1941).

[42]*Cf.* Walker, *Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligations of the Lessee* (1941) 13 Miss.L.J. 292.

[43]196 Miss. 356, 17 So.(2d) 200 (1944).

[44]192 Miss. 378, 5 So.(2d) 666 (1942).

[45]196 Miss. 356, 17 So.(2d) 750 (1944).

[46]193 Miss. 706, 8 So.(2d) 257, 10 So.(2d) 346 (1942).

[47]Lee v. Boyd, 195 Miss. 794, 16 So.(2d) 30 (1943); Lee v. Duncan, 195 Miss. 799, 16 So.(2d) 31 (1943); McCubbins v. Morgan, 23 So.(2d) 926 (Miss. 1945); Thompson v. Wherry. 27 So.(2d) 771 (Miss. 1946). *Cf.* the earlier case of Chism v. Hollis, 152 Miss. 772, 118 So. 713 (1928), which raised also the problem of adequacy of consideration.

MINERAL LEASES IN PUBLIC LANDS

Following the decision in *Stokely v. State* ex rel. *Knox*[48] that the Board of Trustees of the State Insane Hospital had no power to execute a mineral lease on lands owned by the hospital the Legislature established the Mineral Lease Commission with authority to execute mineral leases on state lands.

Power of the Board of Supervisors to execute mineral deeds or leases in connection with county lands was discussed in *Pike County v. Bilbo*,[49] but the restrictive holding in the case was modified by the last legislature.[50] Other acts of this legislature provided for giving of mineral leases on lands owned by counties or cities,[51] by the institutions of higher learning,[52] by agricultural high schools and junior colleges,[53] and by common school districts.[54]

But the big problem in the State in connection with leases in public lands arises in connection with 16th-section lands. Section 211 of the Constitution prohibits the sale of 16th-section lands in the Choctaw Purchase, but permits the lease of such lands outside municipalities for 10 years for a gross sum, and 25 years for annual ground rents, and provides also for lease of uncleared lands for short terms necessary to improve them with right thereafter to lease for a regular term. Since an oil and gas lease in Mississippi amounts to a sale of the minerals in place, it might be urged that mineral leases are completely prohibited by Section 211. *Pace v. State* ex rel. *Rice*,[55] however, held that the word "lands" as used in the section meant only the soil itself, and as it had previously been held that the timber above the soil might be sold[56] so it might now be held that the minerals below might be sold.[57]

A mineral lease normally creates a determinable fee, which may last forever. How do the provisions of Section 211 affect this? No definite decision was reached in the *Pace* case, the court simply declaring that

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[48]149 Miss. 435, 115 So. 563 (1928).
[49]198 Miss. 775, 23 So.(2d) 530, 672 (1945).
[50]Miss. Laws 1946, c. 242.
[51]*Id.*, c. 185.
[52]*Id.*, c. 323.
[53]*Id.*, c. 304.
[54]*Id.*, c. 401.
[55]191 Miss. 780, 4 So.(2d) 270 (1941).
[56]Dantzler Lbr. Co. v. State, 97 Miss. 355, 53 So. 1 (1911).
[57]See the prediction to this effect in Note (1941) 13 MISS.L.J. 453, 466. In other connections, the word "land" is usually construed to include the minerals. See Whelan v. Johnston, 192 Miss. 673, 6 So.(2d) 300 (1942), holding that a charter of the Yazoo and Mississippi Valley Railway, permitting it to take lands by eminent domain, meant that it acquired title to the minerals, too.

the lease was valid at least for 25 years. The question of whether the mineral lease may last for longer than 25 years in case oil is discovered and production continues for a longer period of time therefore remains open. A literal reading of the section would suggest a negative answer, particularly in view of the fact that the instrument is called a "lease"; but it is possible that the power to sell the minerals may be held to carry with it an easement to use the land for a reasonable time in order to acquire them. The reasonable time here may be longer than the "short term as may be deemed proper in consideration of the improvement." Action of the Oil and Gas Board, in regulating amounts of production might easily be held to affect the reasonable time. What would be the effect of expressly providing in the "lease" that title to the oil and gas is not thereby transferred but that title shall be acquired only as the oil and gas is produced? This practice has occasionally been followed in connection with public lands in Texas.[58] Would the holding in connection with a mineral deed be different from that in regard to the lease?

An additional holding in the *Pace* case is that the State may provide for the granting of mineral leases in spite of the fact that the land is already subject to a 99-year agricultural lease.[59] Though the agricultural lessee cannot object to the giving of the mineral lease, it was stated, however, that he may recover damages if his possessory right is injured. Usually, when a landowner sells or rents the surface and retains the minerals, he is held to have an implied easement to use the surface in a reasonable fashion in order to extract the minerals.[60] If the agricultural lease has expressly reserved the minerals, as required by act of the last session of the Legislature,[61] it would appear clear that the lessee is not entitled to damages. Perhaps the same holding would be reached as to agricultural leases made after the decision in the *Pace* case, even though no express reservation is made; the parties should then have realized that the reservation is made as a matter of law. But this lease was executed in 1847, to run for 99 years; there was no thought of any mineral estate, and the holding that it was retained by the State caused the Court considerable difficulty. The situation is an anomalous one in which the Court was obviously trying to make the best compromise adjustment pos-

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[58]*Cf.* Rhoads Drilling Co. v. Allred, 70 S.W.(2d) 576 (Tex.Comm.App. 1934); American Liberty Oil Co. v. State, 125 S.W.(2d) 1107 (Tex.Civ.App. 1939).

[59]This amounted to an overruling of the earlier case of Gulf Refining Co. v. Terry, 163 Miss. 869, 142 So. 457 (1932).

[60]See McNeese v. Renner, 197 Miss. 203, 21 So.(2d) 7 (1945), cited *supra* note 32.

[61]Miss. Laws 1946, c. 443, § 2.

sible as to the various interests of the State and the agricultural lessee.[62] Similar remarks apply to the additional holding that mineral leases cannot be given for lands not in proximity to some producing well.

The statutes[63] providing for the granting of mineral leases on 16th-section lands are construed and found constitutional in *Smith v. McCullen*.[64]

Taxation of Oil and Gas Interests[65]

Unfortunately, the orderly and systematic development of the law of oil and gas has not carried over into the problem of taxation of oil and gas interests, and much confusion and inconsistency has developed in this branch of the field.

The trouble all goes back to two cases decided in 1916. In *Thompson v. Kreutzer*,[66] an annual "occupation" tax of 20 cents per acre was imposed on all real property of persons owning more than 1000 acres, in lieu of the regular ad valorem tax. The Court properly held that this was a tax on ownership, no different from a tax on the land itself, particularly when it was collected annually; and that the tax was in violation of Section 112 of the Constitution, requiring equality of taxation. In *Thompson v. McLeod*,[67] the Court considered the constitutionality of a tax of ¼ cent per cup on persons extracting turpentine from standing timber. Following the *Kreutzer* case, it held that this, too, was a tax on property and in violation of Section 112.

> This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes . . . [or the owner] to enjoy a drink of pure water from the cool spring of the old homestead . . . A tax on an essential attribute of a thing is a tax on the thing itself.[68]

Now, this case is inconsistent with the vast weight of authority. If applied literally, it would render unconstitutional the sales tax, the inherit-

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[62]*Cf.* the similar holding on similar facts in Magnolia Petroleum Co. v. Price, 86 Okla. 105, 206 P. 1033 (1922), cited in the *Pace* case. And see the recent case of Anderson-Prichard Oil Corp. v. McBride, 188 Okla. 384, 109 P. 221 (1940), reiterating the holding in the *Price* case.

[63]Miss. Code Ann. (1942) §§ 6600, 6601.

[64]195 Miss. 34, 13 So.(2d) 319 (1943).

[65]For a more detailed discussion of this topic, see Note, *Taxation of Oil and Gas Interests in Mississippi* (1946) 18 Miss.L.J. 143. In general, conclusions are in agreement with those expressed here. See also Clark, *Tax Titles in Mississippi* (1946) 17 Miss.L.J. 372, 377-78.

[66]112 Miss. 165, 72 So. 891 (1916).

[67]112 Miss. 383, 73 So. 193 (1916).

[68]*Id.* at 388, 389, 73 So. at 194, 195.

ance tax, the gift tax, many of our privilege or occupation taxes, and almost certainly the use or compensating tax. It fails to take into consideration the fact that the legal concept of "ownership" is the collection of the various rights, powers and privileges showing the relationship of the individual to his property. If a single one of these is taxed, the tax is a privilege or excise one. An owner has the right or power of selling or giving away his property, and these are attributes of his ownership, but a tax on them is not regarded as an ad valorem or property tax. So here, the collecting of the turpentine for the purpose of sale is one of the attributes of ownership, but a tax on this "right" alone is not a tax on the property as such. The *McLeod* case has been regarded as extreme by authorities generally and has not been followed. Even in this State it had not been the basis for subsequent decisions, and there was basis for hoping that it would be ignored—as a sort of judicial sport.

This was the condition of things when the Legislature passed in 1944 the oil severance tax (called a privilege, business or occupation tax) of six cents per barrel, which exempted from the property tax all oil produced or under the ground in producing properties, production equipment and producing leases with corresponding mineral rights.[69] The similarity to the turpentine tax is obvious. When its constitutionality was contested in *Gulf Refining Co. v. Stone*,[70] there appeared to be no way of upholding the tax except by overruling the *McLeod* case, but the Court apparently hesitated to do this. Instead, it sought to avoid the application of the *McLeod* case by resorting to reasoning entirely inconsistent with the development of oil and gas law up until that time and by drawing a distinction without a difference. The decision was that oil in place is not subject to a property tax. No one knows how much, if any, there is beneath a particular tract of land, and it is impossible to assess it separately or add its supposed value to a land assessment, reasoned the Court. This rendered the *McLeod* case "not in point on our present inquiry."[71] Actually, of course, the doctrine of the case is still applicable unless the Court goes so far as to hold that oil is not the subject of ownership, but this was apparently overlooked.[72]

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[69]Miss. Laws 1944, c. 134, Miss. Code Ann. (Supp. 1944) §§ 9417-01 through 9417-15.

[70]197 Miss. 713, 21 So.(2d) 19 (1945).

[71]*Id.* at 741, 21 So.(2d) at 21.

[72]The *McLeod* case did talk about the tax as amounting to double taxation and this objection was eliminated by the reasoning in the *Gulf* case. But the opinion in the former case also explains that "Section 112 of our Constitution solemnly declares that 'taxation shall be uniform and equal throughout the state,' and that 'property shall be taxed in proportion to its value.'" It is clearly indicated that if the thing is subject to ownership—is property—then the so-called privilege tax is actually a property tax, and this property is not taxed uniformly with other

Realizing that the question of the taxability of oil and gas leasehold interests would immediately come up, the Court explained that they were still taxable:

> Such a lease or conveyance with the right of entry is an estate in land, subject to ad valorem taxation, but not including the oil or gas as a separate item of valuation.[73]

This is the distinction without a difference which is supposed to distinguish the *McLeod* case. The underground oil itself is not taxable, but the property in it is, if it is carefully called an estate in land. You will have perceived, however, how in reality this still had the effect of overruling the *McLeod* case: exactly the same distinction could have been drawn with the turpentine, which cannot be measured while in the form of resin in the trees and thus cannot be taxed as such, while the timber interest is a property interest and can.

But the result in the *Gulf* case is clearly correct; the tax should have been upheld as a privilege tax. If the only effect of this circuitous method of reaching the result was to cause the careful use of the estate-in-land terminology in imposing a property tax on oil interests, no serious harm seemed done. When taxation is not involved, the Court could talk of ownership of the oil, but in taxation cases it must speak of the estate in land.

Then came the case of *Smith County Oil Co. v. Board of Supervisors of Simpson County*,[74] in which the appellant contested the validity of the assessment of its royalty interest. Here the pent-up error in the *Gulf* case broke loose and caused the entirely erroneous holding that an oil and gas royalty interest in non-producing property cannot be the subject of property taxation, no matter what the Legislature provides. The owner of a royalty interest either (1) owns a certain amount of oil in place, or (2) has a right to a certain amount when it is produced, declared the opinion; if the first is correct, the oil is not subject to an ad valorem tax under the doctrine of the *Gulf* case, and if the latter is true, he has nothing until the oil is produced and cannot be taxed now.

But if the first explanation is correct and Mississippi holds that the royalty holder owns an undivided interest in the minerals below the surface, then the distinction in the *Gulf* case between the oil as such and the estate in land should apply. It is no more meaningless here than it is in

property or in proportion to its value. Manifestly, if oil *in situ* is capable of ownership, a so-called privilege tax which is really a property tax on it, violates Section 112 whether any other property or ad valorem tax is or can be imposed on it or not.

[73] *Id.* at 742, 21 So.(2d) at 21.

[74] 25 So.(2d) 457, *sug. error overr.*, 26 So.(2d) 685 (Miss. 1946).

the case of the leaseholder. The royalty-holder's interest in the minerals is an estate in land and should be subject to tax as such.

If the second explanation above is adopted, the court's thoughtless assumption that there is no present interest and nothing "assessable ad valorem until produced and brought to rest upon the surface"[75] does not follow. Since the days of the feudal system, payments of this sort, whether in money or in kind, have been regarded as a presently existing interest in land, an incorporeal hereditament, like an easement or a profit, usually known by the name of rent.[76] And rent is the subject of taxation, when the statutes so provide. Even if the interest is not given the technical name of rent, it is a presently existing right which can be taxed. If the statute so provides, it is possible to tax a debt as a chose in action while it is still due, instead of waiting until the creditor receives the money. This being an incorporeal interest, the requirement of an inspection set out in the *Gulf* case is not applicable. The question should have been whether the statute actually provided for its assessment.[77]

The real difficulty, of course, goes back to the view that subsurface oil and gas cannot be made subject to tax. No matter what the merit of the requirement that corporeal property must be subject to inspection before it can be assessed, it is hard to see how it became absolutely binding on the Legislature. Does either State or Federal Constitution require it? What clause? Mineral leases and royalty interests both have easily determinable market values, as the opinion in the *Gulf* case itself indicated, and the statute makes this the proper basis of assessment.[78] The number of barrels of oil need not be a separate item of valuation in either. And the distinction between the leasehold interest and the royalty interest on the ground that the former carries surface rights seems completely irrelevant to tax purposes. Can "appraisal of the surface rights" make valuation of the leasehold interest any more feasible or certain than that of a royalty interest?

Finally, the statement that the lease must be assessed "as an entirety to the owner thereof, instead of attempting to split it into fractional

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[75]25 So.(2d) at 457.

[76]See Blake, *Oil Royalties: A Suggested Criterion* (1941) 13 MISS.L.J. 307.

[77]This requires an interpretation of MISS. CODE ANN. (1942) § 9770, which provides that "Whenever any . . . mineral, gas, oil . . . or similar interests in real estate . . . are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate, or when any person reserves any right or interest, or has any leasehold in the elements above enumerated, all of such interests shall be assessed and taxed separately from such surface rights and interests in said real estate . . ." This would appear to be broad enough to include a royalty interest, but there is some slight room for doubt. *Cf.* Notes (1941) 13 MISS.L.J. 427, 451-52, (1946) 18 MISS.L.J. 143, 154-156.

[78]MISS. CODE ANN. (1942) § 9759.

parts"[79] is confusing and provocative of litigation. If this is an absolute (constitutional?) requirement, what is to happen when several persons own the mineral rights as tenants in common? Will it make any difference whether the several interests are created by deed or by "lease"? Is the Legislature powerless to impose a tax on reversionary interests? If the lease is thus assessed "entirely to the owner" and sold for taxes, is the lessor's interest in the oil and gas extinguished by the tax sale? How can he protect his interest? These questions remain unsettled. A mere guess would be that the holding of the *Smith* case will apply only to interests which do not carry surface rights.

The fact that the vast majority of the states hold that a royalty interest is subject to a property tax is brought out in the clear and incisive dissent of Judge Roberds, who also partially dissented in the *Gulf* case.

The opinion of the Court in overruling a suggestion of error in the *Smith County Oil Co.* case[80] provides a justifiable basis for the actual holding in the case. The Board of Supervisors had attempted to back-assess for two years the royalty interest. Previously, both the surface interest and the leasehold interest had been assessed and taxed, and the value of the royalty interest was held to have been included in one or the other of these assessments. Having therefore received taxes on this interest, the county could not attempt to tax it for the same period again, even to the rightful owner. The statement in this opinion that these circumstances make unnecessary any "further review of what was said in the original opinion," may possibly suggest that when the need arises the Court will deliberately re-examine the reasoning in that opinion.

The case of *Kalmia Realty & Ins. Co. v. Hendrix*[81] indicates that the *Gulf* case holds that a leasehold estate in oil and gas is subject to assessment for property taxes.

In *Stern v. Parker,*[82] it was held that when the minerals are owned separately from the surface estate, "both estates are subject to assessment, separately, or as a unit."[83] Where the assessment of the surface estate did not indicate any exception for the minerals, and the minerals were not separately assessed, a sale of the tax title carried with it both estates. The tax lien is in rem, and it makes no difference whether the property is assessed to the right person or not. The opinion declares that the *Gulf* case holds that the mineral estate reserved in the lands is subject to

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[79] 25 So.(2d) at 458.
[80] 26 So.(2d) 685 (Miss. 1946).
[81] 25 So.(2d) 407 (Miss. 1946), not off. rep.
[82] 25 So.(2d) 787, *sug. error overr.*, 27 So.(2d) 402 (Miss. 1946).
[83] 25 So.(2d) at 789.

ad valorem taxation, and refers to the Code Section[84] providing for separate taxation of all mineral interests, which had been ignored in the *Gulf* and *Smith County Oil Co.* cases. The holding in this case is clearly correct.

The importance of all of these cases is much diminished by an act of the last Legislature imposing a "mineral documentary tax" and exempting from ad valorem taxation all non-producing leasehold mineral interests and other interests (including royalty) in the minerals, which are expressly not affected by any tax sale of the surface. The tax, from 3 to 8 cents per mineral or royalty acre, is imposed only on interests created after its enactment; but persons who acquired such interests prior to that time may voluntarily pay the tax and apply for the exemption.[85]

Even this summary statement of the provisions of the act suggests that the old problem of the application of the doctrine of *Thompson v. McLeod*[86] is present, and that the act may possibly be declared unconstitutional. A taxpayer's suit was soon filed in the chancery court of Yazoo County, but Chancellor Montgomery held that the doctrine of the *McLeod* case, if still valid, should be limited to its peculiar facts, so that the act could be held constitutional. On appeal, in the case of *Mississippi Power & Light Co. v. Love*,[87] the Supreme Court held that the exemption was not unconstitutional and that the complainant was not injured by the tax so that he was in no position to complain about it. Judge Roberds dissented on the ground that the exemption was arbitrary and unjustified.

If the question of the constitutionality of the tax itself is ever presented to the Court, difficulty will be experienced in distinguishing the *McLeod* case. If this case is overruled or ignored as it should be, however, it would seem that the tax should be upheld. Cogent economic reasons may be urged for its repeal and the restoration of the regular property tax; but they are concerned with the advisability of the tax, not its constitutionality, and the latter is the only question which the Court has before it.

An interesting question may arise if the act is repealed. May those who have voluntarily paid the tax and applied for the exemption successfully contend that the Legislature has contracted away its power to repeal the exemption? Notwithstanding certain cases involving new industries brought in the State under promise of an exemption, it is believed that the repeal would be effective.[88]

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[84]Miss. Code Ann. (1942) § 9770.
[85]Miss. Laws 1946, c. 409.
[86]112 Miss. 383, 73 So. 193 (1916), cited *supra* note 67.
[87]27 So.(2d) 850 (Miss. 1946).
[88]*Cf.* Adams v. Winona Cotton Mills, 92 Miss. 743, 46 So. 401 (1908); City of Jackson v. Mississippi Fire Ins. Co., 132 Miss. 415, 95 So. 845 (1923); Meador v. Mac-Smith Garment Co., 188 Miss. 98, 191 So. 129 (1939).

A further interesting tax problem is suggested, though not solved in *Merrill Eng. Co. v. Capital National Bank.*[89] After several gas leases had been executed, a pooling agreement was entered into, covering a number of tracts of land. Subsequently one of the tracts was sold for taxes. If the lease had not been separately assessed, or the documentary tax had not been paid, the leasehold interest would also go to the purchaser of the tax title. But what about the rights of other members of the pooling agreement that separate wells not be drilled on the land? Are they extinguished, too? It had previously been held in *City of Jackson v. Ashley*[90] that an equitable servitude in a real-estate sub-division development scheme will be extinguished by tax sale. This is contrary to the great weight of authority and the case was acutely criticised in a *Law Journal* case comment.[91] In spite of the suggestion in the *Merrill* case that the *Ashley* case is applicable, it may possibly be distinguished upon the ground that an easement appurtenant is not extinguished, since it is included in the valuation of the dominant estate.[92] Unless a distinction of this sort is adopted or the *Ashley* case is overruled, the effectiveness of pooling agreements may be somewhat seriously impaired. Indeed, the doctrine of the *Ashley* case may in large measure upset existing oil and gas law. When the surface and mineral estate are separated, either by a deed or by a lease, the owner of the mineral estate has an easement, either expressed or implied, to use the surface in a reasonable manner in order to reach his minerals. Now suppose that the surface estate is sold for taxes. Will this extinguish the easement and thus render the mineral estate essentially worthless? It is hard to conceive that the Court will so hold, and yet it will have difficulty avoiding this result under the *Ashley* case. Perhaps some indication of the holding comes from the fact that adverse possession of the surface does not have the effect of extinguishing the mineral estate owner's easement.

So much for the tax cases, which I have discussed perhaps at undue length. Enough has been said, however, to suggest that a complete re-evaluation by the Supreme Court of its mineral taxation doctrines would be highly desirable. This may be more easily accomplished in view of the fact that none of the cases on taxation of oil and gas interests needs to be overruled. The holding in *Gulf Refining Co. v. Stone* is correct if the severance tax is regarded as an excise tax instead of a property tax, and the holding in *Smith County Oil Co. v. Board of Supervisors of*

[89]192 Miss. 378, 5 So.(2d) 666 (1942).
[90]189 Miss. 818, 199 So. 91 (1940).
[91](1941) 13 Miss.L.J. 653.
[92]The reasoning then would be similar to that used in overruling the suggestion of error in the *Smith County Oil Co.* case. 26 So.(2d) 685.

Simpson County can be justified on the grounds indicated in the suggestion of error; it is only the reasoning in the main opinions in these two cases which is subject to criticism. And while the earlier case of *Thompson v. McLeod* should be overruled, it is not an oil and gas case and has already been overruled by implication by the holding in the *Gulf* case.[93] In case the Court hesitates to overrule it after so long a period of time, it could be expressly limited to its peculiar facts as suggested by Chancellor Montgomery in the *Mississippi Power & Light* case.

Court Review of Action of the State Oil and Gas Board

The very recent case of *California Co. v. State Oil & Gas Board*[94] raises the problem of judicial review of action of the Oil and Gas Board. It must be realized that this problem is not one which is peculiar to oil and gas law but is, instead, primarily one of administrative law, so that cases concerning review of actions of other state administrative boards are relevant. Particularly important in this connection is *Dixie Greyhound Lines, Inc. v. Mississippi Public Service Commission*.[95]

The statute provides for appeal from a decision of the Board to the circuit court of Hinds county or of the county in which the petitioner is engaged. It declares that

> . . . the matter shall be tried *de novo* by the circuit court and the circuit court shall have full authority to approve or disapprove the action of the board.[96]

The requirement that the case be tried *de novo* will give no trouble if the question on appeal is regarded as a judicial one. In such case, there is a complete new trial, with no effect being given to the evidence or decision of the administrative agency. An example of this in Mississippi is an appeal to the circuit court from action of the Board of Supervisors in assessing taxes. Here the court hears the case completely anew and enters the decision which the Board should have made.[97] But if the question is not regarded as a judicial one, the problem is more difficult and the answer is not so clear.

By way of preface, it may be suggested that the characterization of a question or action as judicial or non-judicial for one purpose does not

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[93] See *supra*, p. 256.

[94] 27 So.(2d) 542, *sug. error overr.*, 28 So.(2d) 120 (Miss. 1946). A companion case with the same title was stated in a memorandum opinion to be controlled by the principles announced in the preceding case. 27 So.(2d) 548, *sug. error overr.*, 28 So.(2d) 121.

[95] 190 Miss. 704, 200 So. 579, 1 So.(2d) 489 (1941).

[96] Miss. Code Ann. (1942) § 6136.

[97] See Note (1942) 14 Miss.L.J. 426, 436-37. Significantly, many states do not regard this as a judicial question.

mean that it is placed in this category for all purposes; different decisions on this issue are not interchangeable. Here we are concerned with whether the question is a judicial one for purpose of review. Should the court (including the jury as a fact-determining agency) review the action of the administrative agency? The caption, judicial or non-judicial, is less likely to prove an aid in reaching a decision than an explanation after the decision has been reached.

With this in mind, is the question on an appeal from a decision of the Oil and Gas Board a judicial one? If the action of the Board has been the making of rules and regulations, the decision seems fairly obvious that the action, being one of policy-making, is legislative in character and not judicial. Even so, some argument could be made that the courts have traditionally performed acts of a similar nature. Compare, for example, the action of the "court or chancellor" when a drainage district is being organized. He hears the petition and determines "whether the creation of the district would meet a public necessity and would be conducive to the public welfare." If he approves, he refers the petition to the county drainage commissioners. He then hears their report and any objections thereto, and determines whether the district should be organized, whether additional ditches should be included and other matters.[98] Yet this procedure has been traditional for many years. Is the question not one of policy-forming in either case?

Agreeing, however, that the making of rules or regulations is legislative in character, we still have not met the exact issue in the *California Co.* case. The action of the Board there was to grant an exception to the well-spacing rule. The Board had previously declared by rule that exceptions to the well-spacing rule might be granted "in order to prevent waste or the confiscation of property."[99] Here is a standard already created to serve as the basis for decision. Is it any different in kind from the standard of "reasonable conduct" used in negligence cases or the covenant to develop with reasonable diligence held by the courts to be implied in oil and gas leases? In many respects they are similar; the term, standard, properly describes all three. Yet there are differences, too. The latter two have customarily been administered by the courts, and the courts have a tradition and a legal meaning behind them. The first depends far more upon technical knowledge for its application. The knowledge of an expert, rather than simply a judicial temperament is required. To quote the opinion in the *California Co.* case:

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[98]MISS. CODE ANN. (1942) §§ 4580-91.
[99]27 So.(2d) at 543.

> In such case the Court would be departing from its proper judicial function into the realm of things about which it has no such knowledge as would form the basis for intelligent action.[100]

In other words, it is the nature of the subject matter which indicates the need for a specialist instead of a court (judge and jury), rather than the form of the standard used for reaching decisions.

Thus a decision either way is perfectly justifiable on the problem whether the granting of an exception is a judicial question or not. The Mississippi Court has held that it is not. Some courts agree with it; others disagree and hold that it is a judicial question or at least a so-called quasi-judicial one.

Assuming that the question is a non-judicial one, the Court may still review the action of the Board to determine whether it acted within its power or whether constitutional rights have been violated. Can it pass on the merits of the action as such? There are at least three degrees of authority which the court might attempt to exercise in passing on the merits of the action of the Board. (1) It might pass on the problem itself and itself take what it regarded as the proper action. This is the concept of trial *de novo* and is clearly inappropriate. (2) It might pass on the evidence and simply approve or disapprove the action of the Board. This course of conduct some courts have approved, particularly if they can call the question at least a quasi-judicial one. (3) It may pass on the merits to determine whether there is substantial evidence to sustain the finding of the Board. This conduct courts generally approve and the Mississippi Court sanctioned in the *California Co.* case. The original question is still the same, a non-judicial, policy-making one. Yet it is regarded as judicial to determine whether there is "substantial evidence" to sustain the administrative agency's decision on the non-judicial question—perhaps for the same reason that a jury question is one of fact but is called a question of law when the court determines that there is not enough evidence to go to the jury. Two decisions from the Federal Supreme Court will illustrate the point. The Radio Act of 1927 gave the Circuit Court of Appeals power to hear appeals from the decisions of the Radio Commission in granting or refusing permits for radio stations and to "alter or revise the decision appealed from and enter such judgment as to it may seem just."[101] In *Federal Radio Commission v. General Electric Co.*,[102] the decision was found not to be a judicial judg-

[100] *Id.* at 546.
[101] 44 STAT. 1169 (1927).
[102] 281 U.S. 464, 50 S.Ct. 389, 74 L.Ed. 969 (1930).

ment reviewable by the Supreme Court. The act was amended to provide "that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious."[103] In the case of *Federal Radio Commission v. Nelson Brothers Bond & Mtge. Co.*,[104] the Court decided that the review was a proper one, presenting a judicial question for it to decide. So here. The Mississippi Court has simply construed the statute to reach this effect rather than requiring the Legislature to amend it.

Under the decision in the *California Co.* case, then, on an appeal from the Board, the circuit court is limited to determining

> . . . whether or not its decision is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the Board to make, or whether it violates any constitutional right of the complaining party.[105]

The last two of these determinations may cause some difficulty, but it is the first one with which we should be primarily concerned. When is a decision supported by substantial evidence? What do we mean by substantial evidence? This is a standard, too, similar to some of the others which we have mentioned. But though the standard is becoming increasingly used both in judicial opinions and in legislative acts, the courts are not yet in agreement as to its meaning. Meanings at opposite extreme would be the scintilla rule, on the one side, and a weighing of the testimony to determine what was a right result, on the other. In between are a number of meanings. The phrase is sometimes regarded as synonymous with "arbitrary and capricious action." It is sometimes said that the test is met when there is "rational basis" for the decision. At other times, an analogy is drawn with the relationship of the court to the jury, and use is made of either the test for directing a verdict or the test for setting aside the verdict of the jury as against the weight of the evidence. In Mississippi, these are completely separate rules. When it is directing a verdict for the defendant, the court looks only to the plaintiff's evidence to see whether it is so inadequate or inconsistent by itself as not to warrant a verdict. In determining whether to set aside a verdict and grant a new trial, the court looks at all of the evidence, but does not weigh it to determine the preponderance but only to tell whether a reasonable jury could have reached the result.[106]

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[103]46 STAT. 844 (1930).
[104]289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1116 (1933).
[105]27 So.(2d) at 547.
[106]See Note, *When May The Court Direct a Verdict in Mississippi?* (1940) 12 MISS.L.J. 350.

The Mississippi Court has not yet clearly indicated which of these tests it will adopt. In the *Dixie Greyhound* opinion, a few words inclosed in parenthesis suggest the scintilla rule.[107] A decision to adopt this test is greatly to be deprecated. In the several times that the Court has used the phrase "substantial evidence" it has always used it with the phrase "arbitrary or capricious," joined together by the conjunction "or." This may mean either that they are synonymous or that they have separate meanings, amounting to distinct requirements. The latter interpretation seems more likely. The last time it expressed the standard in the *California Co.* case, it said that the court

> . . . shall only inquire into whether or not the same is reasonable and proper according to the facts disclosed before the Board, that is to say, whether or not its decision is supported by substantial evidence . . .[108]

This may possibly be an indication that the Court is adopting the test used in determining whether to set aside a verdict and grant a new trial. It seems to me that this is by far the most suitable and appropriate test. It has meaning; the courts have long been accustomed to apply it; it will insure that the judicial temperament is used in reaching decisions of the Board; it will not require the judge to become a technical expert in conducting the review; it apparently eliminates the need of a jury in conducting the review. It is easily expressed by saying that the decision of the Board will stand unless the court finds that the Board could not reasonably have reached that result. Emphasis is on the verb, *could*.

An entirely separate problem is that of whether in conducting the review the court is to hear its own evidence or is to consider only the evidence which was presented before the Board. It would have been possible to construe the clause in the statute about trial *de novo* to make it mean that the court hears its own evidence; and this would have obviated the need of ruling that clause unconstitutional. Once it is determined, however, that the clause is ruled out completely, it seems more feasible to limit the evidence to that heard by the Board. A party can introduce what evidence he needs before the Board as well as before the court; and if the Board restricts him improperly, he can complain to the court about the Board's procedure. The holding on this issue is an efficient, practical one even though it is a little surprising when taken in connection with the language of the statute.

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[107]". . . whether there is substantial (that is, more than a scintilla of) evidence to support the judgment of the Commission." 190 Miss. 704, 712, 200 So. 579.

[108]27 So.(2d) at 547.

In a specially concurring opinion, Judge Griffith had forcefully urged that the Court declare that the circuit court conducting the review should be confined to a transcript of the record before the Board. This apparently was emphasized by the attorneys in the suggestion of error, but the Court felt that it could not judicially announce a rule on this matter in advance—when the lower court had not admitted or denied any evidence and there was therefore no appellate question for the appellate court to pass on. The opinion, however, implies that the Court recognizes the need of clarifying this point and that when an appeal comes up in which the lower court has ruled on the admission of evidence the Supreme Court will then be able judicially to declare its views. In addition to the reasons presented by Judge Griffith for requiring a certified transcript of the record in order for the court to pass upon the Board's action, the effect of such a requirement upon the Board itself is very important. If the Board knows that a transcript of all the details of the proceeding may be reviewed by the Court, it will obviously be more careful in following correct and orderly procedure and in preparing a presentable record. Thus the requirement will be beneficial not only in the cases which are appealed to the circuit court but also in the much larger number of cases which are not appealed.

As a final word on judicial review, it may be added that the federal district courts are practically ruled out as a source of review as a result of the decisions in the two *Rowan & Nichols* cases[109] and *Burford v. Sun Oil Company.*[110]

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[109]Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S. 73, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570, 61 S.Ct. 343, 85 L.Ed. 358 (1941). See Summers, *The Rowan & Nichols Cases* (1941) 13 Miss.L.J. 417; Armstrong, *Federal Courts and Administrative Action Under State Statutes: An Aspect of the Rowan & Nichols Cases* (1942) 14 Miss.L.J. 335.

[110]319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

SPACING, POOLING AND FIELD-WIDE UNITIZATION*

Raymond M. Myers†

Under the common law, there were no restrictions on the drilling of oil and gas wells. Spurred on by the Law of Capture[1] the operators endeavored to "git there fustest with the mostest" wells. Whether the desire was to capture a neighbor's oil or only to protect property lines, the result was great waste and the economic loss that always follows the drilling of unnecessary wells. It was seen very early that orderly development and true conservation demanded as a minimum the proper spacing of wells.[2]

The first well-spacing rule promulgated in the United States was passed by the Railroad Commission of Texas in 1919, known as Rule 37. It was passed pursuant to a waste statute that placed the enforcement of conservation measures in the hands of that body. This rule prohibited the drilling of wells less than 300 feet apart and less than 150 feet from property lines, and has been upheld as a reasonable exercise of the police power for the prevention of waste and unnecessary fire hazards.[3] This rule has been changed from time to time, the tendency being to increase the distances from the property lines and between wells. This rule is of state-wide application. However, many fields in the State are covered by special rules which take precedence over the state-wide rule.

The same result is achieved by the establishment of drilling units of specified size. Many of the states, such as Arkansas and Oklahoma, when granting the authority to fix drilling units, place a ceiling on the amount of acreage to be included therein. Drilling units are defined as the maximum area that may be economically and efficiently drained by one well.

These statutes and the rules pursuant thereto usually provide for the granting of exceptions after notice and hearing, and it is the abuse of this right and the fixing of drilling units on too small a spacing pattern that has resulted in the drilling of unnecessary wells. In the East Texas Field, where the allowable is not reduced because of the smallness

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[1]Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas* (1935) 13 Tex. L. Rev. 391.

[2]*See* Moses, *The Constitutional, Legislative and Judicial Growth of Oil and Gas Conservation Statutes* (1941) 13 Miss. L. J. 353; Hardwicke, *Oil Conservation: Statutes, Administration, and Court Review, id.* at 381.

[3]Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.(2d) 935 (1935) and cases cited therein.

of the tract, more than one-half of the wells were drilled as exceptions to Rule 37. The drilling of one well under an exception leads to the granting of others, resulting finally in the virtual abrogation of the rule.

As the number of wells in a field increases, the allowable per well must necessarily decrease, making it more and more difficult for the wells to pay out. Unquestionably, in many fields the operators have invested more money than they have been able to receive therefrom out of production. It may safely be said that any well drilled upon a tract smaller than that established by the spacing rule is an unnecessary well.[4]

Several States have attempted a solution of this problem. In New Mexico the statute provides for permissive pooling.[5] This law states that the enforcement agency may require pooling where an owner of a tract less than the drilling or proration unit would otherwise be deprived of the opportunity to produce his fair share of the oil or gas. However, the owner is not denied the right to drill and produce his tract if no waste is involved, but in such case the allowable production from such tract as compared with the allowable production if such tract were a full unit, shall be in the ratio of the area of such tract to the area of a full unit.

In Arkansas[6] the law, after providing for the establishment of drilling units, provides that where two or more tracts are embraced within an established drilling unit, the owners thereof may voluntarily pool their interests and develop the same as a unit, and that if they fail to agree they may be required to do so. The law further provides that if compulsory pooling is found to be beyond the power of the Commission, one who drills on a tract less than the drilling unit shall be penalized by a proportionate reduction in his allowable.

Under the above law, many integration orders have been issued by the State Oil and Gas Commission and its right to do so has not been denied by the courts.[7]

A copy of such an order may be secured from the Commission.[8] This integration order first sets out in detail the rights of the parties. After reciting that the various interests are integrated for the purpose of preventing waste and to avoid the drilling of unnecessary wells, it sets out how the proceeds of the oil and gas are to be divided, designates an

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[4]*See* Walker, *The Problem of the Small Tract Under Spacing Regulations* (1938) TEX. L. REV. (Bar. Ass'n Number) 157.

[5]N. M. Laws 1935, c. 72, § 12; N. M. STAT. ANN. (1941) § 69-213.

[6]Ark. Acts 1939, No. 105, §§ 11(j), 14, 15, as amended.

[7]See dicta in Yelvington v. Alston, 207 Ark. 266, 180 S.W.(2d) 120 (1944).

[8]See APPENDIX, *infra*.

operator, provides for the drilling of a well or wells, provides that the operator shall receive all of the proceeds of the sale of the oil and gas and deduct the operating expenses attributable to the other interests. Attached to the order is a detailed "Accounting Procedure." The operator can obtain the non-operator's share of the expense of development and operation only out of the proceeds of production. Thus, the entire risk of obtaining a dry hole is on the shoulders of the operator who is normally the proponent of the order.

The Louisiana law[9] provides for voluntary pooling but further provides for enforced pooling where the owners of two or more separately-owned tracts that are embraced within a single drilling unit fail or refuse to develop their tracts as a unit. This right of the Commissioner has been directly upheld by the courts in the case of *Hunter Company v. McHugh*.[10]

The enforced pooling provision of the Oklahoma statute is the most detailed of any.[11] Under this law the Commission is given the power to establish "well-spacing and drilling units of specified and approximately uniform size and shape for any common source of supply or prospective source of supply in this State." There is, however, a very definite limitation on the jurisdiction of the Commission to establish well-spacing units of more than 10 acres in size in oil pools, as in these cases the owners of at least 66⅔ percent of the acreage covered by leases of record must consent to the size of such spacing units. There is also a ceiling on gas wells of 640 acres and on oil wells of 40 acres above 8,000 feet and 160 acres below 8,000 feet. Pooling of two or more separately-owned tracts within the spacing unit is permitted. Where the owners have not agreed to pool their interests, they may be required to do so. The law provides in detail for notice and hearing, and details what the order shall contain.

Enforced pooling in Oklahoma was upheld in the case of *Patterson v. Stanolind Oil and Gas Company*.[12]

A list of the conservation laws of the various States containing spacing and pooling provisions has been compiled in the Appendix, *infra*. This list indicates where such provisions may be found in the statutes and also gives the names of the conservation authorities in whose hands jurisdiction is placed.

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[9]La. Acts 1940, No. 157, §§ 8, 9.
[10]202 La. 97, 11 So.(2d) 495 (1942), *appeal dismissed*, 320 U.S. 222 (1943).
[11]Okla. Stat. Ann. Title 52, § 87.
[12]182 Okla. 155, 77 P.(2d) 83 (1938), *appeal dismissed*, 305 U.S. 376 (1939); see also Croxton v. State, 186 Okla. 249, 97 P.(2d) 11 (1939).

The power of regulatory bodies to require pooling of small tracts in order to conform to prescribed spacing patterns for the purpose of preventing waste, protecting correlative rights, removing fire hazards and other dangers, has been upheld in the federal courts as well as in state courts.[13]

If a spacing rule is a good conservation measure, if it is an economic boon in preventing the drilling of unnecessary wells, then it would seem to follow that enforced pooling is necessary. All of the laws that require pooling also provide for a fair division of the oil and gas beneath the drilling unit. Many have reason to fear the encroachment of regulatory authorities, but here is one area where these authorities may, it is believed, function under law to the best interest of the industry.

While waiting for more enlightened statutes providing for enforced pooling, the operators in many States have for many years accomplished, or attempted to accomplish, the same purpose by voluntary agreements. After pooling in one of the ways mentioned hereafter, there is usually an operating agreement covering the joint operation of small tracts as a unit.[14]

Leases may be pooled by the joinder of the land owners in the execution of a community lease which, by its terms, constitutes a form of pooling. It has been held, however, that leases may just as effectively be communitized where all the land owners sign together an ordinary lease and it does not appear that the lessors did not intend to pool the leases.[15] There are many unanswered problems relating to community leases, at least in Texas, and it would seem preferable to approach the problem frankly with a pooling agreement.

Voluntary pooling takes another form in cases where a pooling provision is included in an oil and gas lease. A typical provision reads as follows:

> Lessee is hereby granted the right to pool or unitize this lease, the land covered by it or any part thereof with any other land, lease, leases, mineral estates or parts thereof for the production of oil, gas or any other minerals. No unit for the pro-

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[13]Marblehead Land Company v. City of Los Angeles, 47 F.(2d) 528 (C.C.A. 9th, 1931), *cert. denied,* 284 U.S. 634 (1931); Marrs v. City of Oxford, 32 F.(2d) 134 (C.C.A. 8th, 1929), *cert. denied,* 280 U.S. 573 (1929); Tysco v. Railroad Commission, 12 F.Supp. 195 (S.D. Tex. 1935), and companion case of same name, *id.* at 202.

[14][The speaker here referred to a typical form of operating agreement covering the joint operation of small tracts as a unit, copies of which had been distributed to members of the Institute. A copy of this instrument may be obtained upon request from Mr. Myers at Box 900, Dallas, Texas.]

[15]French v. George, 159 S.W.(2d) 566 (Tex.Civ.App. 1942).

duction of oil shall embrace more than forty (40) acres; provided, however, that if any Federal or State law, Executive order, rule or regulation shall allocate a producing allowable on acreage per well, then such units may embrace such acreage as may be so prescribed. Lessee shall file written unit designations in the county in which the premises are located. Drilling operations and production on any part of the pooled acreage shall be treated as if such drilling operations were upon or such production was from the land described in this lease, whether the well or wells be located on the land covered by this lease or not. The entire acreage pooled into a unit shall be treated for all purposes, except the payment of royalties on production from the pooled unit, as if it were included in this lease. In lieu of the royalties herein provided, lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved.

In the exercise of the powers here given, the lessee must exercise good faith. This means, among other things, that lessor's productive land cannot be pooled with unproductive land to the disadvantage of lessor.[16] The power to pool must be exercised within the terms of the authorization.[17] The inclusion of the above wording in an oil and gas lease will be found ample for the purpose. Where it is desired to limit the size of gas units, such a provision may also be included.

We now turn to a subject of considerably more importance—field-wide unitization. A clear distinction must be drawn between the words "pooling" and "unitization." When leases covering small tracts are consolidated, usually to constitute a drilling unit, it is referred to as "pooling," whereas the consolidation of all leases in a field, or a substantial portion thereof, is referred to as "unitization."

It is difficult to overestimate the advantages accruing from unitization in the field of conservation and efficient operation. Without it, cycling operations, repressuring, pressure maintenance and the efficient development and production of a field as a whole are practically impossible. A common pool or field is a unit by nature and the pressures therein, whether hydrostatic or gas, are common to the whole reservoir. The position of the oil and gas in the pool does not, of course, follow property lines, and therefore to adhere to property lines in their development is to drill unnecessary wells, and to produce oil and gas with the least efficiency. Large economies result through avoiding duplication of equip-

[16]Imes v. Globe Oil & Ref. Co., 184 Okla. 79, 84 P.(2d) 1106 (1938.)
[17]Schlittler v. Smith, 128 Tex. 628, 101 S.W.(2d) 543 (1937).

ment, through centralized management, and in other ways. Through this decreased cost of operation, the abandonment of wells is delayed.

The purposes for which unitization may be used are as follows:

(1) Salt water disposal,
(2) Oil production in an oil field,
(3) Water-flooding,
(4) Gas production,
(5) Cycling operations,
(6) Pressure maintenance and storage,
(7) Repressuring, or combinations of such purposes.

One of the methods of disposing of salt water is to place it in sands or reservoirs beneath the surface by means of injection wells. Where this operation is apt to encroach on the neighbors' land, the need for unitization arises.

The increase in the amount of oil that may be produced from an oil field by pressure maintenance following unitization is astonishing. The experts say that under ordinary primary production methods only about 25 percent of the oil originally in place can be recovered. By unitizing the field and returning the gas to the oil formations, the amount of oil ultimately recovered can be doubled. If gas from the gas cap is produced but not reinjected, the pressure in the gas area decreases, with two results. First, the oil migrates to the gas sand where through wetting of the sand it becomes irretrievably lost, and second, oil production from oil wells decreases because of lack of pressure. Casinghead gas and gas cap gas that are often wasted are saved for future use.

Water-flooding consists of the injection of water through properly spaced input wells into an oil-producing stratum for the purpose of washing the sands and carrying the oil before it into the bore of the producing wells, thus increasing the percentage and rate of recovery of oil from the stratum. As a secondary recovery method, it seeks to recover oil which would not be otherwise recoverable. Cases are known where ultimate production has been doubled by this method. For the most effective and safest use of this operation, unitization is needed and property lines disregarded.[18]

Cycling (or recycling) is an operation used in gas-distillate fields involving the production of gas containing liquid hydrocarbons from properly spaced wells, the processing of said gas in a plant and the re-

[18] *See* Brown and Myers, *Water Flooding—Some Legal Aspects* (1946) 24 TEX. L. REV. 456.

turn of the residue gas into the formations from whence it came. It permits the sale of its liquid content in the form of propanes, butanes, gasoline and heavier products, avoids waste of gas, maintains the pressure in the pool until all wet gas is exhausted, thereby preventing retrograde condensation, and then constitutes a supply of dry gas for sale, held in the best storage known to man. This operation is the last word in conservation and efficient production.

Mr. D. R. Knowlton, who became well known for his fine services during the war in the Office of the Petroleum Administration for War, lists the advantages that accrue to the producer from unitization as follows:

(1) Less capital investment required,
(2) Lower development cost,
(3) Lower operating cost,
(4) Products would be made more responsive to the producer's needs,
(5) Increased acre oil yield,
(6) Increased gas value,
(7) Stabilized business,
(8) An investment more readily salable,
(9) More actual control over business,
(10) More dependable crude supply for the other branches of the business,
(11) Saving on plant capacity,
(12) Saving on pipe line and storage tanks.

In many States unitization has been accomplished by voluntary action under permissive statutes[19] but Alabama, Florida, Georgia, Louisiana and Oklahoma approach compulsion, especially with reference to cycling.

Typical of a provision providing for the enforced unitization of a field to recycle gas is Louisiana's law.[20] Under this authority, orders have been issued, including Order No. 10-C, promulgated January 26, 1941, covering the Cotton Valley Field, Webster Parish, Louisiana. The operators had, prior to the issuance of the order, drawn a voluntary agreement and it had been largely executed.

The best law covering field-wide unitization is found in Oklahoma.[21] This statute, covering the unitized management of common sources of supply is, in fact, not entirely compulsory, as the Commission does not take jurisdiction except upon the petition of lessees of record of fifty

[19]This authorization in Texas is limited to gas. TEX. REV. CIV. STAT. (1925) Art. 6008, § 21.
[20]La. Acts 1940, No. 157, § 4(b).
[21]OKLA. STAT. ANN. Title 52, § 286 *et seq.*

percent or more of the area of the common source of supply. Lessees of record of fifteen percent or more of the unit area or proposed unit area may veto the plan. However, this will not constitute too great an obstacle to the unitization of fields as it is compulsory as to royalty, and it is in this field that operators have found their chief difficulty. This law should be studied in detail but, briefly, it provides for a finding on the part of the Commission of the feasibility of the project and sets out what the order must contain. The provisions of the unit agreement are, in general, similar to the typical plan of unitization discussed below. The nature, purposes and functions of the unit, and the liability of the owners of oil and gas rights therein, are provided for in the order. Provisions for amendments and enlargement of the unit are also included. Such agreements are not violative of the anti-trust laws of the State of Oklahoma.

This statute has not as yet been tested in the courts but an application has been filed with the Corporation Commission covering the West Cement Medrano Sand Pool in Caddo County, Oklahoma. Hearing on this application began on December 9, 1946. This matter will certainly be carried through the courts. The sanction by the courts of this statute will be a great boon to the industry and to conservation authorities alike.[22]

Voluntary agreements of one kind or another have been used extensively and for many years in consolidating leases into units, field-wide in their scope, and these agreements have been particularly useful in later years with the advent of gas-distillate fields.

A recent example of field-wide unitization is the agreement which has actually been put into operation in the Chesterville Field, Colorado County, Texas.[23] This may be regarded as typical of such contracts, though they necessarily vary in their terms to fit particular situations. One who has not had experience in developing a unit, cannot possibly appreciate the tremendous amount of effort that goes into the consummation of the program. Extensive work must be done by petroleum engineers and geologists to determine the feasibility of the operation. It is often difficult to determine whether or not the field should be unitized in its early stages or should be first extensively developed. There are dangers inherent in either plan. If it is developed too early, it is impossible to exactly outline the producing area, whereas if it is extensively developed, it is more difficult to satisfy the various interests involved. The large number of operators in the field must next be convinced of its

[22]See Oil and Gas Journal, Dec. 7, 1946, p. 80.

[23][A copy of this instrument may be obtained upon request from Mr. Myers. See note 14, *supra.*]

feasibility and then, through prolonged discussion and argument, the contract is evolved, with a nice balancing of rights and values. We will examine, in some detail, the provisions of this agreement:

Article 1 sets out the purpose of the contract, which is to establish a unit plan of development and operation for the field, to prevent waste, to recover the maximum amount of gas and hydrocarbons, to erect a plant, if feasible, to return gas to a gas-producing formation in the field and to divide fairly the revenues among the parties.

Article 2 contains definitions. A great deal of research is required in determining the outline of the field as set out in "Exhibit A." This often is arrived at by extensive trading and negotiation among the parties. One of the most important definitions in the contract is that of "unitized substances." This may include gas with its constituent elements, as in this case, or may include oil and gas, or, as in some cases, may include oil and casinghead gas only.

Article 3 contains the words of unitization. In some cases, assignments are exchanged among the operators, but this would not seem to be necessary as each operator otherwise obtains a contractual interest in all the tracts in the unit. Allocation among the tracts is based on acre feet of sand. This is a scientific advance over allocation based on surface acres only, and is a truer representation of the amount of gas actually in place beneath each tract.

One of the most important features of a unitization agreement is the allocation to tracts and the delivery to each operator of his portion of the products to be disposed of as he sees fit. Any gas sold is disposed of by an agent and the proceeds divided. Out of the allocation made to him, each operator accounts to his own royalty owners for the amounts due them, and the basis for the payment of royalties is always set out. The basis for the payment of royalty, particularly where a plant is involved, has always been a matter of extensive discussion between the operators and royalty owners.

Article 4 provides for the purchase of existing wells, so that the wells may be used for the purposes of the unit and so that all personal property may be owned by the operators in proportion to their ownership of the unitized substances.

Article 5 provides in this case for the determination of the feasibility of a plant. In many cases the contract provides specifically for its erection. The plant is built under the supervision of the Operators' Committee, is operated by the Unit Operator and is owned by the operators in proportion to their ownership of the unitized substances.

Article 6. Since only gas and its liquid content is here unitized, it follows that the oil has a separate ownership, and thus arrangements must be made for the separate development of the oil and the gas. Provision is also made for taking over oil wells drilled by the Unit Operator and for the taking over of gas wells drilled by the owner of the oil.

Article 7 provides for the purchase of casinghead gas from oil wells.

Article 8 provides for the perpetuation of the leases by production of unitized substances at any point in the unit, and makes it clear that this instrument supersedes the oil and gas leases in so far as it provides for the payment of royalties, the production of oil from the unit, and the return of residue gas and other matters.

Article 9 creates the Operators' Committee and sets out the details of its organization and provides for its powers.

Article 10 designates the Unit Operator and outlines his or its powers.

Article 11 has to do with taxes.

Article 12 provides that the royalty owners shall not be liable for development or operating expense.

Article 13 provides for the examination of titles and the rejection of tracts without good title.

Article 14 states that the contract is subject to the conservation laws.

Article 15 provides for extending the participating area. This is an important provision since usually, at the time of organizing the unit, the development of the field has not been concluded. In order to be taken into the unit, the tract must be productive of unitized substances in commercial quantities from sands or formations that are also found under the participating area and constituting an extension of the field. A contract may lay down certain conditions under which these tracts are taken into the unit, or the matter may be left entirely to the Operators' Committee to admit the tracts upon conditions prescribed by them. When new tracts are admitted, Schedule C, which sets out the percentages of participation of the various operators, must be amended.

Article 16 provides that in this particular case participation shall, in the first stages, be on the basis of surface acres and that the computation of the number of acre feet of sand for each tract shall be made later when the field has been sufficiently developed, but not to exceed five years from the effective date. In other cases, the acre feet of sand

may be computed initially. Other formulae for participation may be used, but these are the most common.

Article 17 clearly states the relationship of the parties.

The remainder of the articles are common to all contracts, but require no specific comment except Article 19. This article varies under different plans of unitization, but here the unit goes into effect when operators owning as much as ninety percent of the participating area and royalty owners owning as much as sixty percent of the participating royalty, have signed the agreement. It is, of course, hoped that after the unit goes into effect the remaining interest holders may be persuaded to sign the agreement. It is extremely difficult, however, to obtain the signatures of all royalty owners and the lessee, of course, is without power to consolidate the royalty interest of his lessor in the absence of statutory authority.[24] In cases where the unit goes into effect without the signature of some of the royalty owners, many problems arise in the operation and development of the unit. At times this results in the payment of additional royalty. In some cases it determines the location of the unit wells. In every unit that is not completely unitized, the difficulties encountered emphasize the necessity of some form of enforced unitization.

One-fifth of the land within the boundaries of the United States is owned by the Federal Government. The government has maintained a policy of reserving the minerals in land sold by it, and since government oil and gas leases cover over three million acres of land, it becomes very important to discuss unitization as it affects the public domain.

The Constitution of the United States grants to Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[25] In the case of *Utah Power & Light Company v. United States,* the court said, through Justice Van Devanter:

> From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights-of-way over them for highways, railroad, canals, ditches, telegraph lines and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the in-

[24]Knight v. Chicago Corporation, 188 S.W.(2d) 564 (Tex. 1945).
[25]U. S. Const. Art. IV, § 3(2).

> stances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. Wilcox v. Jackson, 13 Pet. 498, 516; Jourdan v. Barrett, 4 How. 168, 185; Gibson v. Chouteau, 13 Wall. 92, 99; Camfield v. United States, 167 U. S. 518; Light v. United States, 220 U. S. 523, 536-537. And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. "A different rule," as was said in Camfield v. United States, supra, "would place the public domain of the United States completely at the mercy of state legislation."[26]

In Summers, *Oil and Gas,* the author says:

> The production of oil and gas from the public domain of the United States is governed by Acts of Congress and the regulations of the Department of the Interior. The present law consists of the Mineral Leasing Act of 1920,[27] its subsequent amendments, and the act providing for the leasing of naval petroleum reserves.[28]

Pursuant to the authority granted in the statute, the Secretary of the Interior has promulgated regulations. They are contained in General Land Office Circular Number 1386 and Circular No. 672, as well as an unnumbered publication of the United States Department of the Interior Geological Survey denominated "Oil and Gas Operating Regulations, applicable to lands of the United States and to all restricted tribal and allotted Indian land (except Osage Indian reservation), revised November 1, 1936." All federal statutes regulating the production and transportation of oil and gas are found in Chapter 29 of Summers, *Oil and Gas.*[29]

Under the law and regulations, all leases granted on public lands may be forfeited and cancelled by judicial proceedings for failure of the lessee to comply with the various sections of the Act, the terms of the lease or the regulations of the Secretary of the Interior promulgated under the Act.

It is thus seen that the United States Government controls leases on its public lands not only by virtue of the authority as outlined before

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[26]243 U.S. 389, 404, 37 S.Ct. 387, 61 L.Ed. 791 (1917). This case has been followed in numerous instances. Rosen v. U. S., 245 U.S. 467, 473, 38 S.Ct. 148, 62 L.Ed. 406 (1918); Oklahoma v. Texas, 258 U.S. 574, 595, 42 S.Ct. 406, 66 L.Ed. 771 (1922); McKelvey v. U. S., 260 U.S. 353, 359, 43 S.Ct. 132, 67 L.Ed. 301 (1922).

[27]30 U.S.C.A. § 181 *et seq.*

[28]4 SUMMERS, THE LAW OF OIL AND GAS (Perm. ed. 1938) § 867.

[29]5 *id.* § 971 *et seq.*

but also because of its contractual rights as set out in the leases. However, the statute which authorizes the Secretary of the Interior to prescribe necessary and proper rules and regulations contains these qualifying words:

> Nothing in said sections shall be construed or held to affect the rights of the State or other local authorities to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines or other rights, property or assets of any lessee of the United States.[30]

From the authorities above cited, it should be concluded that the United States government, through the Secretary of the Interior, has the power and authority to issue rules and regulations with reference to all conservation matters affecting public lands and that these regulations would prevail even if in conflict with otherwise applicable State conservation statutes and regulations.

The Secretary of the Interior is authorized by statute to approve unitization agreements.[31] Many have, in fact, been approved and are in operation.

A hearing of several days' duration was held in Denver, Colorado beginning November 17, 1943, for the purpose of adopting regulations for the development and operation as a unit of oil and gas fields involving public lands. The Department of the Interior and the Geological Survey submitted proposed regulations and a proposed form of unit agreement. Opposition developed at the hearing and a long delay ensued, but regulations, together with a suggested form of unit agreement, have now been issued.[32] The suggested form is not compulsory and wide latitude is given the industry in drafting unit agreements.

It was stated at the Denver meeting that the difficulties encountered in unitizing public lands included, among other things, the insistence of the government, though only a royalty owner, that it dictate the terms of the unit agreement. The feeling on the part of the State concerned was that its conservation laws should govern, especially where State land is involved. The general difficulty of dealing with local agents of limited authority was also expressed. The answer of the government was that the law required the supervision of the Secretary of the Interior and that the agents are only doing their duty.

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[30] 41 STAT. 450 (1920), 30 U.S.C.A. § 189 (1942).
[31] See 30 U.S.C.A. §§ 182-184.
[32] See Federal Register, Jan. 25, 1947, p. 528. Copies may be obtained from the Interior Department, 930 Munsey Building, Washington, D. C.

The objection has been raised that under a unit agreement the operators form themselves into an association taxable as a corporation under the Federal Income Tax Law. If so held, not only would the unit be taxed as a corporation, but all payments made to interest holders would be considered dividends and taxable as income to the recipients. However, numerous cases have held that when co-owners of an oil and gas lease enter into an operating contract for the development and operation of a co-owned property, a joint adventure partnership results, not an association.[33]

The Circuit Court of Appeals said in the case of *Commissioner of Internal Revenue v. Rector & Davidson:*

> The Supreme Court recognized five salient features of a corporation in the case of Morrissey v. Commissoner, 296 U. S. 344, 56 S.Ct. 289, 80 L.Ed. 263. They are (1) title to the property held by the entity, (2) centralized management, (3) continuity uninterrupted by deaths among the beneficial owners, (4) transfer of interest without affecting the continuity of the enterprise, and (5) limitation of the personal liability of participants.[34]

It is evident that on the basis of the salient features of a corporation, which the courts look to in determining this question, the unitizaion agreements here under discussion should not be construed to be "associations."

A unit agreement similar to the Chesterville agreement had not been before the courts until the Commissioner of Internal Revenue attempted to hold the East Alice (Texas) Unit taxable as a corporation.

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[33]Campbell v. Pettigrew, 268 S.W. 615 (Ark. 1925); Tidal Oil Co. v. Fullerton-Stuart Lumber Co., 137 Okla. 58, 278 P. 330 (1929); Ash v. Mickleson, 118 Okla. 163, 247 P. 680 (1926); Wagner Supply Co. v. Bateman, 118 Tex. 498, 18 S.W.(2d) 1052 (1929); Leath v. Benson Abstract & Title Co., 9 S.W.(2d) 501 (Tex.Civ.App. 1928).

The following authorities are to the same effect: Cogdall v. Cottrell, 82 Okla. 125, 198 P. 581 (1921); Cox v. Bond, 91 S.W.(2d) 479 (Tex.Civ.App. 1936) (wherein recent leading authorities on the subject are discussed); Ebberts v. McLean, 68 S.W.(2d) 1077 (Tex.Civ.App. 1934); Champion v. D'Yarmett, 293 S.W. 587 (Tex.Civ.App. 1927); Bolding v. Camp, 296 S.W. 1116 (Tex.Civ.App. 1927), *rev'd,* 6 S.W.(2d) 94, *modified,* 7 S.W.(2d) 867 (Commission of Appeals, 1928); Indiahoma Rfg. Co. v. Wood, 255 S.W. 212 (Tex.Civ.App. 1923); 2 THORNTON, OIL AND GAS (5th ed. Willis 1932-3) 662; see also American Digest System, *Mines & Minerals,* Key No. 1, and cases there cited.

In accord are the following tax cases: Commissioner of Internal Revenue v. Rector and Davidson, 111 F.(2d) 332 (C.C.A. 5th, 1940), *cert. denied,* 311 U.S. 672 (1940); Commissioner of Internal Revenue v. Horseshoe Lease Syndicate, 110 F.(2d) 748 (C.C.A. 5th, 1940), *cert. denied,* 311 U.S. 666 (1940); Burnet v. Burns, 63 F.(2d) 313 (C.A.A. 8th, 1933) (co-owner not taxable as member of an association because his one-fourth interest is developed and operated by trustee as common agent); Reynolds v. McMurray, 60 F.(2d) 843 (C.C.A. 10th, 1932).

[34]111 F.(2d) 332, 333 (C.C.A. 5th, 1940), *cert. denied,* 311 U.S. 672 (1940).

After extended negotiations, the Commissioner stipulated with the taxpayers that the unit was not so taxable and the Tax Court, on November 18, 1946, entered an order carrying said stipulation into effect. Following this happy disposition of the case, there should be no further objection to unitization on this ground.

Fear of prosecution under the Federal and State anti-trust laws[35] has been, in some cases, advanced as a reason for not entering into unitization agreements.

As a general rule we believe it may safely be said that the activities of operators under a unit agreement, confined to the purposes above mentioned, cannot be considered as cooperative activities forbidden by these laws. The activities that have been condemned have to do with prices and the restrictions of production for the purpose of limiting competition.[36] The regulation by agreement of the output of plants, etc., is sometimes used as a means of suppressing competition and, as such, is condemned.[37] However, it has been held in Texas that restriction of production by allocation and by limitation to market demand is a valid exercise of authority by the Railroad Commission[38] and the restriction of production under the police power has been upheld generally.[39] It would seem that if the operators in the unit would carefully avoid discussions of prices or the restriction of output for any reasons except the legitimate purpose of conservation, then there need be no fear of prosecution under the anti-trust laws of the State and Nation.

The anti-trust laws have been advanced in some instances as reasons for not entering into these cooperative activities. These objections have, in some cases, been based on a real fear of prosecution and in other cases have been advanced for selfish reasons. Legislation, both State and Federal, which would exempt these activities from the purview of the anti-trust laws would, therefore, be a great encouragement to the creation of more units for the purposes here discussed. This has been done

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[35]*Federal:* 15 U.S.C.A. §§ 1-7 (Sherman Anti-Trust Act of 1890); 28 U.S.C.A. §§ 381-390 (Clayton Act of 1914). *Mississippi:* MISS. CONST. (1890) § 198; MISS. CODE ANN. (1942) §§ 1088-1108. *Texas:* TEX. CONST. Art. 1, § 26; TEX. STAT. (Vernon, 1936) Art. 7426-7428.

[36]U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); U. S. v. Trenton Potteries Co, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); U. S. v. American Linseed Oil Co., 262 U.S. 371, 43 S.Ct. 607, 67 L.Ed. 1035 (1923).

[37]American Column & Lumber Co. v. U. S., 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284 (1921).

[38]Danciger Oil & Refining Co. v. Railroad Commission, 49 S.W.(2d) 837 (Tex.Civ.App. 1932), *rev'd*, 122 Tex. 243, 56 S.W.(2d) 1075 (1933).

[39]Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062 (1932); Ohio Oil Co. v. Indiana, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729 (1900).

in Mississippi by a statute to the effect that these agreements do not violate the anti-trust laws of Mississippi when such agreements are approved by the State Oil and Gas Board.[40]

Parties to such agreements will of course not be protected simply because they have reduced their purposes to writing, if, as a matter of fact, in their meetings, discussions and activities, they make use of their association to violate the law.

Appendix
Provisions in Some State Laws Providing for Spacing and Pooling

Alabama—Ala. Code (1941 Supp.) Title 26, § 179(6); Ala. Acts 1945, No. 1, §§ 12, 13; State Oil and Gas Board, University, Alabama.

Arkansas—Ark. Acts 1939, No. 105, §§ 11(L), 14, 15; Arkansas Oil and Gas Commission, El Dorado, Arkansas.

California—Code Public Resources (Deering) Div. III, C-3, §§ 3600-3605, as amended; Cal. Stats. 1945, cc. 139, 141; Department of Natural Resources, Division of Oil and Gas, State Oil and Gas Supervisor, Sacramento 14, California; Warren T. Hannum, Director of Natural Resources, State Office Building, Sacramento 14, California, Reed D. Bush, State Oil and Gas Supervisor, Ferry Building, San Francisco, California.

Colorado—Col. Stat. Ann. (1935) c. 118, §§ 38-52, 64-67; Rules & Reg., Rule 2-C; Gas Conservation Commission, Denver, Colorado; Warwick M. Downing, 824 Equitable Building, Denver 2, Colorado; H. C. Bretschneider, First National Building, Denver 2, Colorado; Lafayette Hughes, 616 Majestic Building, Denver 2, Colorado, W. Roy MacGinnis, 300 Logan Street, Denver 9, Colorado.

Florida—Fla. Stat. Ann. (Supp.) Vol. 14, §§ 377.01-377.40; Fla. Laws 1945, H.B. 284; State Board of Conservation, Tallahassee, Florida; Governor is Chairman.

Georgia—Ga. Laws 1945, p. 366, § 14; Oil and Gas Commission, Waycross, Georgia; Geo. M. Bazemore, Chairman, Waycross, Ga., J. A. Pope, Alamo, Ga., Paul H. Ploeger, Darien, Ga., C. W. Deming, Director, Waycross, Ga. (Pooling provisions similar to Ark. and La.)

Illinois—Ill. Stat. Ann. (Jones) Vol. 16. c. 104, §§ 82-84; Ill. Laws 1941, Vol. 1, p. 934; Department of Mines and Minerals, State

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[40]Miss. Code Ann. (1942) § 6172.

Capitol, Springfield, Illinois; Robert M. Medill, Director, 401 United Mine Workers Bldg., Springfield, Illinois, C. C. Curtis, Oil Conservation Supervisor, Oblong, Illinois, J. W. Spence, Administrative Assistant, Geff, Illinois, H. Bruce Thompson, West Salem, Illinois, Charles E. Jones, Technical Advisor, Robinson, Illinois, Samuel F. Peterson, Petroleum Engineer, Springfield, Illinois.

KANSAS—KAN. GEN. STAT. (1941 Supp.) § 55.602; State Corporation Commission, New England Bldg., Topeka, Kansas; Jeff A. Robertson, Chairman, DeWitt M. Stiles, Donald G. Sands, Commissioners, W. F. Turrentine, Jr., Secretary, all at New England Bldg., Topeka, Kansas, T. A. Morgan, Director of Conservation Division, 800 Bitting Bldg., Wichita 2, Kansas.

LOUISIANA—LA. GEN. STAT. (Dart) §§ 4741.11-4741.31; La. Acts 1940, No. 157, §§ 3(m), 8, 9 (pooling); Commissioner of Conservation, Capitol Bldg., Baton Rouge, La., Jos. L. McHugh, Commissioner, 900 Capitol Bldg., Baton Rouge, La., Dr. J. Huner, State Geologist, Baton Rouge, La., F. V. Carter, Chief Engineer, Baton Rouge, La.

MICHIGAN—Mich. Pub. Acts 1939, No. 61, §§ 6(j), 13 (pooling); Commission of Conservation, Supervisor of Wells, Lansing, Michigan; P. J. Hofmaster, Director, Department of Conservation, State Office Bldg., Lansing 13, Michigan.

MISSISSIPPI—MISS. CODE ANN. (1942) §§ 6132-6179; State Oil and Gas Board, Jackson, Mississippi; Gov. Fielding L. Wright, Greek L. Rice, Attorney General, Guy McCullen, Land Commissioner, H. M. Morse, Supervisor, all at Jackson, Mississippi.

MONTANA—MONT. REV. CODE ANN. (1935) §§ 3554.1-3554.19; Oil Conservation Board, Helena, Montana; A. B. Cobb, Chairman, Box 1122, Great Falls, Montana, M. R. Wagner, Cut Bank, Montana, C. A. Haeckel, Bozeman, Montana, L. J. Yealy, Vice-Chairman, Shelby, Montana, Casper T. Oien, Oilmont, Montana, R. P. Jackson, Secretary, Great Falls, Montana.

NEW MEXICO—N. M. STAT. ANN. (1941) Title 69, § 213; Oil Conservation Commission, Box 871, Santa Fe, New Mexico; Governor Thomas J. Mabry, Chairman, John E. Miles (State Land Commissioner), R. R. Spurrier (State Geologist), Secretary and Director, all at Box 871, Santa Fe, New Mexico.

NORTH CAROLINA—N. C. Laws 1945, cc. 702, 765; Department of Conservation and Development, Petroleum Division, Raleigh, North Carolina.

North Dakota—N. D. Rev. Code (1943) §§ 38-0801 to 38-0823; Industrial Commission, Bismark, N. Dakota; Governor is Chairman.

Ohio—Ohio Gen. Code Ann. (Page, 1946 Replacement) §§ 898-181 to 898-200; Department of Industrial Relations, Division of Mines, Columbus, Ohio.

Oklahoma—Okla. Stat. Ann. Title 52, § 87; Corporation Commission, Capitol Office Bldg., Oklahoma City, Oklahoma; Reford Bond, Chairman, Ray O. Weems, Vice-Chairman, W. J. Armstrong, Walker T. Pound, all at Capitol Office Bldg., Oklahoma City, Okla.

South Dakota—S. D. Laws 1943, c. 153, §§ 4(g)(4), 6(c)(12); State Oil and Gas Board, State Capitol, Pierre, South Dakota; Governor is ex-officio Chairman.

Tennessee—Tenn. Code (Williams, Supp.) §§ 5240.1-5240.5; Tenn. Acts 1943, c. 64; State Oil and Gas Board, Nashville, Tennessee; Paul Mathes, Commissioner of Conservation, Chairman.

Texas—Tex. Stat. (Vernon, 1936) Art. 6029; Rule 37; Texas Railroad Commission, Austin, Texas; Ernest O. Thompson, Chairman, Olin Culberson, William Murray, K. C. Miller, Secretary, Jack L. Baumel, Director of Production, all at Austin, Texas.

Arizona, Colorado, Idaho, Indiana, Iowa, Kentucky, New York, Ohio, Oregon, Pennsylvania, Utah, Washington, West Virginia, and Wyoming do not have the more comprehensive type of conservation statutes. The laws of these states are limited to prohibiting waste of natural gas, prescribing methods of plugging wells, etc.

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NOTES

Procedure Before the Public Service Commission and Judicial Review of Its Decisions

The Mississippi Legislature in 1938 created the Public Service Commission, abolished its predecessor, the Railroad Commission, and conferred the latter's powers and duties upon the successor.[1] Therefore, early statutes and court decisions referring to the Railroad Commission are applicable to the Public Service Commission. The jurisdiction of the Commission is set out by statute.[2] The Mississippi Supreme Court has held that the statute conferring jurisdiction must be strictly construed, that jurisdiction claimed by the Commission must be explicitly provided and cannot be implied.[3]

The procedure before the Public Service Commission is set forth in more than a score of statutes, incongruously interspersed in the Code of 1942 among more than two hundred sections in three chapters. There are few judicial interpretations of the statutes. The statutes provide for procedures in particular types of cases which differ from procedures in other instances although from a practical procedural viewpoint no reason for such differences is apparent.

The Commission

The Commission is composed of three members, two of which constitute a quorum. It holds its regular meetings on the first Tuesday of each month. It has the authority to pretermit as many as two regular meetings a year and may hold recessed or special hearings as its business may require. Although the regular meetings must be held in Jackson, special or recessed meetings may be held at any designated point in the State. Regular minutes of the proceedings, orders, findings, and acts of the Commission are kept and such minutes are a public record.[4] Failure to enter an order on the minutes will result in a reversal for the

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[1]Miss. Laws 1938, c. 139, Miss. Code Ann. (1942) § 7703. The Mississippi Constitution of 1890, Article 7, § 186 provides: "The legislature shall pass laws to prevent abuses, unjust discrimination, and extortion in all charges of express, telephone, sleeping car, telegraph, and railroad companies, and shall enact laws for the supervision of railroads, express, telephone, telegraph, sleeping-car companies, and other common carriers in this state, by commission or otherwise, and shall provide adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their franchises."

[2]Miss. Code Ann. (1942) §§ 7635, 7637.

[3]South Miss. Airways v. Chicago and Southern Airlines, 26 So.(2d) 455 (Miss. 1946).

[4]Miss. Code Ann. (1942) § 7696.

party affected, and the Commission must start new proceedings before it can take action against him.[5]

Matters to be considered by the Commission are first placed on its formal docket. A matter may be placed on the docket by application of a regulated utility; by complaint of anyone feeling aggrieved; or by order of the Commission on its own motion. The docket of the Commission is a public record and may be examined by anyone upon request. Monthly calendars, listing all cases entered on the docket, are mailed about ten days in advance to the parties who are to appear before the Commission.[6]

Time of Notice

Requirements as to the amount of time to be given a litigant between notice and hearing vary depending on the type of hearing the Commission contemplates. When the Commission is to determine whether a domestic telephone or telegraph company is rendering public service in a reasonably adequate manner, the statute only requires "reasonable notice" as a condition precedent to a hearing.[7] How much time the Legislature intended that such a company should have between notice and hearing to prepare its case is not clear. No Mississippi court has handed down a decision interpreting "reasonable notice" in a case of this type. However, the notice required may be clarified somewhat by the statutory section which stipulates that in all cases of complaint against a common carrier other than those concerning the revision of tariffs, the Commission must give such notice "as it may adjudge proper, but not less than five days." This statute further provides: "In other cases, where notice is given or required to be given to any railroad or common carrier, five days' notice shall be sufficient."[8] As a matter of practice, the Commission is liberal in postponing cases where a request is so made by letter, telephone, or telegram, provided the reasons are legitimate and valid.[9] This policy may well eliminate any need for an interpretation of what is meant by a reasonable notice.

In other instances, the statute is definite in regard to the amount of time to be given between notice and hearing. In hearings for a telephone or telegraph company to show cause why it should not be required

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[5]Mississippi Railroad Commission v. Gulf, Mobile and Northern R. Co., 170 Miss. 124, 155 So. 212 (1934).

[6]Rules of Practice and Procedure and Miscellaneous Orders Having General Application and General Orders, Mississippi Public Service Commission, p.3; Miss. Code Ann. (1942) § 7808.

[7]Miss. Code Ann. (1942) § 7704.

[8]*Id.* § 7809.

[9]Rules of Practice and Procedure, *supra* note 6 at 4.

to obey an order of the Commission not less than thirty days' notice is required.[10] Any domestic corporation of this kind must be given at least five days' notice before a hearing to determine the forfeiture of its charter.[11] A minimum of ten days' notice must be given a railroad or other common carrier before a hearing to revise its tariffs or charges.[12] If a motor carrier is involved in a hearing of this kind, the proposed general order, rule, regulation, or requirement must be included in substance in the notice.[13]

Method of Serving Notice

The statute is not clear as to the method by which notice shall be served in cases involving the public convenience and necessity of a telephone or telegraph company, other than that such service shall be reasonable.[14] But, in a hearing for the company to show cause why it should not obey an order of the Commission based on such hearing, notice must be served by registered United States mail on an executive officer of the company. A copy of the petition of the attorney general must be attached to the notice.[15] Notice in a case to revise the tariffs of a common carrier may be served either by United States mail or personally upon any officer, agent, or employee of the railroad or common carrier by an officer, who must make a due return.[16]

Of the methods of serving notice which are authorized by statute, registered mail seems the most desirable. The constitutionality of service of notice by ordinary mail is established.[17] While slightly more expensive than ordinary mail, registered mail renders evasion of service more difficult. Service by registered mail is more economical than personal service of notice, yet actual notice is equally insured.[18]

The statute indicates that the service of process by mail shall be limited to service upon parties *within the State*.[19] The Supreme Court,

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[10]MISS. CODE ANN. (1942) § 7705.
[11]*Id.* §§ 7707, 7709.
[12]*Id.* §§ 7809, 7637(d).
[13]*Id.* § 7637(d).
[14]*Id.* § 7704.
[15]*Id.* § 7705.
[16]*Id.* § 7810.
[17]Ernshaw v. U. S., 146 U.S. 60, 13 S.Ct. 14, 36 L.Ed. 887 (1892).
[18]These conclusions are based upon proposed legislation in *Fourth Ann. Report and Studies* (1938) 183 of the Judicial Council of the State of N. Y.; see GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS (1940) 530 *et. seq.*
[19]MISS. CODE ANN. (1942) § 7810: "All notices given or required to be given or served upon a railroad or other common carrier of passengers, freight, or intelligence, shall be sufficiently served and executed upon a railroad or other carrier when deposited in the post office, postage paid, addressed to the railroad or other common carrier, or to a chief or other officer of the railroad or other com-

however, has held the statute directory in this respect and not mandatory, at least where the administrative action is not judicial in nature and a proper officer of the corporation affected actually receives the notice.[20]

The provision of the statute dealing with the requirements of notice personally served does not contain the limitation provided by the statute relative to the service of notice through the mail.[21] There is no judicial decision to aid in the clarification of the former provision. However, judging from the liberal interpretation of the latter provision in *Gulf and Ship Island Railroad Co.* v. *Laurel Oil and Fertilizer Co.*, it would seem that the statute would be deemed satisfied regardless of where the notice might be served, so long as the requirements as set out in that opinion are met. It may be that the statute is sufficient to satisfy procedural due process by providing for notice before hearing. In another jurisdiction, where a similar statute was under construction, the court held that notice did not have to comply strictly with the statute as long as the defendant is given ample opportunity to be heard.[22]

Trial Examiner

The statute provides for a trial examiner in matters arising in the administration of the Motor Carrier Act. Before the orders recommended by the trial examiner can become the final order of the Commission, the motor carrier must be properly notified of such order and given a chance to file whatever exceptions it may have to it. The statute provides that a copy of the recommended order in writing accompanied by the reasons therefor shall be served upon the interested party. The interested party has thirty days or more, if the Commission so authorizes, in which to file his objections. The failure to file objections will result in the Com-

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mon carrier at its principal place of business in this state, if any there be, and, if not, so deposited and addressed in care of an officer, agent, or employee of the railroad or other carrier at an office or place of business in this state of the railroad or other carrier. . ."

[20]Gulf and Ship Island R. Co. v. Laurel Oil and Fertilizer Co., 172 Miss. 630, 645, 158 So. 778, 781 (1935): "It will be noticed that this is not a notice in a judicial proceeding but is a proceeding before the railroad commission in this case affecting the fixing of rates, and strictness is not required in such a notice and the purpose of the law is to give the railroad or other carrier notice so that it may appear and be heard prior to the time when the rates are to be fixed and established.

"We think the statute is directory and not mandatory in so far as the method for serving notice is concerned. Such method is not exclusive, and, if the notice is served in such manner as to get it to the proper officer having charge of the matter before the railroad commission, or the officer whose duty it would be to transmit it to the proper officer, and such notice is actually received by the proper officer of the carrier, it is a sufficient compliance with the statute."

[21]Miss. Code Ann. (1942) § 7810: ". . . or it may be served upon any such officer, agent, or employee, wherever found, by an officer. . ."

[22]State *ex rel* Railroad Commissioners v. Florida East Coast Railroad Co., 69 Fla. 480, 68 So. 729 (1915).

mission's making the trial examiner's recommendation the order of the Commission. However, the Commission may in its discretion postpone the order.[23]

The Hearing

To obtain a hearing before the Commission, apparently, no prescribed forms are required except in cases of applications for certificates of public convenience and necessity, and applications by contract carriers for permits. Other applications, petitions, or complaints must set out fully the nature of the matter sought to be brought before the Commission.[24] To get a cause on the docket, applications for certificates of public convenience and necessity and applications by contract carriers for permits must be on file with the Commission not less than twenty days before they may be heard.[25] Applications, petitions, or complaints regarding rate matters must be on file not less than ten days, before they may be heard.[26]

The parties interested in a cause to be heard by the Commission may appear either in person or by counsel. It appears to be immaterial to the Commission which form of appearance is chosen, as long as the case is developed in an orderly and expeditious manner.[27] The full docket as indicated by the calendar is sounded at the beginning of each regular meeting. The parties appearing before the Commission and desiring to be heard should respond to the sounding of the docket and state their willingness and readiness for a hearing.[28] In the past, some cases before the Commission have been decided without oral arguments or the filing of briefs. However, the Commission will accept briefs on request of any party appearing in the case.[29]

It is not clear whether a record of evidence is required in all cases. Section 7706 requires that the official stenographer of the Commission shall take down all testimony.[30] Section 7814 stipulates that in all cases arising from the supervision of common carriers where the testimony is oral "any interested party or the Commission shall have the right to have

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[23]MISS. CODE ANN. (1942) § 7678.
[24]Rules of Practice and Procedure, *supra* note 6 at 3.
[25]MISS. CODE ANN. (1942) § 7641.
[26]Rules of Practice and Procedure, *supra* note 6 at 4.
[27]*Ibid.*
[28]*Ibid.*
[29]*Ibid.*
[30]It is not clear whether "official stenographer" in this section means the secretary as provided in § 7689 MISS. CODE ANN. (1942), or the stenographer provided for in § 7024 MISS. CODE ANN. (1930) as amended by Chapter 141, Laws 1938 [see Note to § 7689 of MISS. CODE ANN. (1942)], or § 7814 of MISS. CODE ANN. (1942).

the testimony taken down and transcribed by a stenographer."[31] There is no decision interpreting the statutes.

The Commission may subpoena witnesses and punish for contempt. It has the authority to use the subpoena in obtaining any witness, book, paper, or document in any matter pending before it or any of its members. The subpoena may be issued by the Secretary under the seal of the Commission or by any Commissioner without the seal. If a witness refuses to answer any proper question propounded to him by the Commission or any of the Commissioners; if he should obstruct the Commission or Commissioners in the discharge of duty; or if he should conduct himself in a rude, disrespectful, or disorderly manner before the Commission, he will be guilty of a misdemeanor, punishable by a fine upon conviction.[32] The oath may be administered to the witnesses by the several members of the Commission and its Secretary, who may also take affidavits. The witnesses may be questioned under oath by any member of the Commission in all matters coming before it. It is also provided that if any person testifies falsely, or makes any false affidavit or oath before the Commission, or before any of its members, or before any officer, to any matter coming before the Commission, he will be guilty of perjury, and, upon conviction, will be punished according to law.[33]

Evidence

The statute does not prescribe rules of evidence to be followed in a hearing before the Commission. The informal settling of matters involving conflicting interests is encouraged by the Commission, and conflicting interests may be settled without going through a formal hearing.[34] In many cases, the Commission has assisted in the development of facts needed for reaching decisions.[35]

The Mississippi Court has not gone far into any detailed discussion of rules governing the admission of evidence before the Commission.[36] Dean Kimbrough had the following to say on this question:

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[31]Miss. Code Ann. (1942) § 7814 further provides: that the stenographer must be agreed upon by the parties or appointed by the Commission; that he must be duly sworn; that he must certify to the transcript of the testimony with any one of the Commissioners to entitle its acceptance as evidence on appeal; that he be paid out of any funds of the Commission; that the Commission has the right to require any party demanding an official stenographer to guarantee or prepay the costs thereof in all proper cases.

[32]Miss. Code Ann. (1942) § 7811.

[33]*Id.* § 7812.

[34]Rules of Practice and Procedure, *supra* note 6 at 3, 4.

[35]*Ibid.*

[36]Kimbrough, *Mississippi Supreme Court Decisions on Administrative Law* (1945) 17 Miss.L.J. 127, 146, 147.

> The Mississippi Court, while making no definite announcement as to rules of evidence in any case coming before it, where it was originally heard by an administrative tribunal, would apparently follow the rules . . . laid down by the Supreme Court of the United States.[37]

The rules of evidence as laid down by the United States Supreme Court interpreting federal legislation regulating administrative hearings similar to those by which the Public Service Commission is governed are: the litigant must be fully appraised of the evidence submitted or to be considered; he must have the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal; the determination of the administrative agency must be in accord with facts proved; and a finding without evidence is arbitrary and baseless. In support of these rules, the Court has pointed out:

> The more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended . . . In no other way can a party maintain its rights or make its defenses. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the findings.[38]

A more recent United States Supreme Court decision involved the reliance by the Interstate Commerce Commission upon annual reports of carriers not introduced as evidence in reaching a decision. The Court, following the above opinion, stated:

> The mere admission by an administrative tribunal of matter which under rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order . . . But a finding without evidence is beyond the power of the Commission. . . . Nothing can be treated as evidence which is not introduced as such.[39]

If the rules of evidence in the above cases were to be applied strictly to the Public Service Commission, it would be forced to consider each case as a separate and unique matter rather than merely as another link in its chain of experience in the administrative area in which it operates. Such a strict application would be antagonistic to the administrative

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[37] *Id.* at 147, 148.

[38] I. C. C. v. Louisville & N. R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431, 434 (1913).

[39] United States v. Abilene and So. R. Co., 265 U.S. 274, 288, 44 S.Ct. 565, 68 L.Ed. 1016, 1022 (1924).

process. It would place the Commission on the same footing as a jury, although a jury is totally unfamiliar with the factual situation it is to decide. The benefits of the special skill, knowledge, and experience of the members of the Commission would be forfeited. Unnecessary delay and expense would result. Information of which the Commissioners are fully aware due to their special skill and experience would have to be introduced as evidence. The Commission might be forced to reach a result which it knows to be unjust.

The evils of a strict application of these rules of evidence to the Commission could be averted by according it a power similar to that of courts to take "judicial notice" of certain facts. This doctrine as applied to the Commission may be referred to as "official notice." There is more reason in order to expedite a hearing, to grant the Commission power to deem certain facts and propositions indisputable than to bestow such power on the courts. The Commission, since it acquires a specialized knowledge from the constant handling of a particular type of case, is in an excellent position to exercise official notice expeditiously.

Unrestricted application of the doctrine of official notice, however, would give rise to problems concerning a fair trial and judicial review. Therefore, its exercise should be limited. Facts of which the Commission takes notice should be only those that are included in the Commission's own records, and those that have become known in the course of its ordinary experience. These facts should be made known to the litigant as early as possible so as to avoid surprise. Such facts with a citation of their source should be included in the record so that the question of whether the Commission's determination of fact is supported by substantial evidence can be determined accurately on review.[40]

The rules of evidence, as summed up in a pamphlet issued by the Commission, are that the evidence "should conform to requirements of our circuit and chancery courts; hear-say evidence may not be presented, and witnesses giving expert testimony must prove their qualifications."[41]

It would seem that the above quotation could not be literally accepted. Especially so in view of what Dean Kimbrough had to say on the subject:

> It is generally recognized that common law or jury trial rules of evidence have no place in administrative procedure. On the other hand, the basic and general principles of evi-

[40]See GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941) 82 *et seq.*
[41]Rules of Practice and Procedure, *supra* note 6 at 4.

> dence and proof are recognized in administrative proceedings. . . . The agency not being a court presided over by one learned in the law and the rules of evidence, most naturally it might be expected that evidence prohibited by common law rules would creep into the case.[42]

It is desirable that there be no set rules of evidence for the Commission comparable to those of orthodox trial techniques. For the Commission to function according to the true administrative process, it must be allowed a direct approach to the facts and issues involved in the controversy. The decision must, of course, rest upon reliable information, but the admissibility of evidence must be stripped of unnecessary forms, technicalities, and distinctions. Otherwise little progress can be made toward economical and speedy settlement of controversies upon their merits and with a minimum of procedural encumbrances.[43]

There are certain factors which the statute requires the Commission to consider in the testimony before it. In the evidence presented in attempting to obtain a certificate of public convenience and necessity, the Commission must give due consideration to the present transportation facilities over the proposed route of the applicant; the volume of traffic over such route; the financial conditions of the applicant; and the condition of the highway over the proposed route or routes.[44]

To determine rates for the transportation of passengers or property by common or restricted common carriers by motor vehicle, the Commission must give due consideration to the following factors: the inherent advantages of transportation by such carriers; the effect of rates upon the movement of traffic by such carriers; the need of the public of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such services; and the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.[45] In any proceeding to determine the reasonableness or justness of any rate or fare charged by any carrier, the good will, earning power, or certificate under which the motor carrier is operating is not admissible either as an element of value of the carrier or as evidence.[46]

The statute nowhere expressly provides that the Commission in the fixing of rates shall consider what would be a fair return on the cor-

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[42]Kimbrough, *supra* note 36, at 146.
[43]Gellhorn, Federal Administrative Proceedings (1941) 75 *et seq.*
[44]Miss. Code Ann. (1942) § 7642.
[45]*Id.* § 7664.
[46]*Id.* § 7663.

porate investment of the particular corporation. There is some language, however, which would imply that the Legislature intended that this element should be considered.[47] The Supreme Court has never interpreted the statute on this question. Should it be called on to do so, it seems that it would be bound by decision of the United States Supreme Court holding that a rate is confiscatory and contravenes the due process clause of the Fourteenth Amendment of the United States Constitution, unless an opportunity is provided for a court of law upon an independent examination of both the law and facts to judge whether a fair return upon a fair value of the property is allowed.[48]

Findings

Upon a hearing, as provided by statute, the Public Service Commission must make distinct findings of fact on the following questions:

> . . . whether (1) the corporation is or is not rendering in a reasonably adequate manner the public service authorized by the corporate charter of such corporation; (2) if not, what would be reasonably necessary to be done to make such service reasonably adequate; (3) whether by reason of its financial condition, such corporation may be reasonably expected to make such changes as would be reasonably necessary to make such service reasonably adequate; (4) what would be a reasonable time, not less than sixty days, within which such changes should be made.[49]

So far as can be determined, the Commission is only required by the statute to make distinct findings of fact in cases involving the question of whether the corporation is performing according to its charter. There are no court decisions interpreting what would be a sufficient compliance with this statute. The United States Supreme Court has held, however, that where a statute delegating authority to an administrative body expressly requires the finding of facts compliance with the statutory man-

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[47] *Ibid.* Since it is specified that neither good will, earning power, nor the certificate under which such carrier is operating is to be considered as evidence or elements of value of the property of such carrier, it is inferred that the value of the property of the carrier is to be considered. *Id.* § 7664 provides: "In the exercise of its power to prescribe just and reasonable rates . . . the Commission shall give due consideration, among other factors, to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service." *Id.* § 7871 provides: "In revising, fixing and regulating charges for transportation, the commission shall take into consideration the character and nature of the service to be rendered and the entire business of the railroad or other common carrier and its earnings from all kinds of traffic, and shall so revise, fix and regulate the charges as to allow reasonable compensation for the service to be rendered."

[48] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920).

[49] MISS. CODE ANN. (1942) § 7706.

date is a condition precedent to the exercise of the delegated authority. The Court further held that if the required findings are not expressly stated, the Court will not imply them, and the finding will be null and void because of lack of jurisdiction by the agency making it.[50]

The reasons for requiring the Commission to make distinct findings of fact to support its holding are: such a requirement would induce a keener sense of responsibility on the part of the Commissioners; it would aid the reviewing court immeasurably in the formulation of its decision; the issues to be decided on review would be limited thereby saving the time of the litigants and courts. Carried to the extreme, however, the requirement would result in slowing down the work of the Commission and requiring the reviewing court to be too technical in its examination of the case.

Orders

All orders and decisions of the Public Service Commission that affect railroads or other common carriers are to be certified to the railroad or other carrier, or to some officer, agent or employee of the railroad or carrier, and executed in the same manner as notices to them are required to be served.[51]

The Commission has the authority to resort to the circuit or chancery courts to enforce its orders.[52] However, the orders must be sufficiently definite to preclude misinterpretation or the courts properly may decline their enforcement.[53] An order fixing rates must be consistent with other rate fixing orders for the same type services or it will be held confiscatory and a deprivation of property without due process of law.[54] For an order of the Commission directing a railroad, motor carrier, or telephone company to perform certain acts to be reasonable and enforceable the action to be taken must be within the scope of the business in which it is engaged.[55]

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[50]Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas, 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124 (1922).

[51]Miss. Code Ann. (1942) § 7816.

[52]*Id.* § 7817.

[53]Mobile and O. R. Co. v. Miss. Pub. Ser. Comm., 188 Miss. 698, 707, 195 So. 305, 307 (1940): "There is as much ground for requiring a reasonable certainty and fair precision in the orders of the State Public Service Commission in respect to rates as there is in requiring definiteness and precision in the decrees of the courts; and unless these qualities are preserved in these rate orders, the courts may properly decline to aid in their enforcement."

[54]Miss. Railroad Comm. v. Mobile and O. R. Co., 154 Miss. 871, 123 So. 876 (1929).

[55]Miss. Railroad Comm. v. Yazoo and M. V. R. Co., 100 Miss. 595, 56 So. 668 (1911).

Methods of Obtaining Judicial Review

The circuit or chancery courts have the power to grant relief to litigants aggrieved by action of the Commission, and the decisions of such courts are subject to appeal by the aggrieved party to the State Supreme Court.[56] The relief granted by the chancery court may be in the form of an injunction against the order of the Commission.[57] The district attorney or the attorney general handles the appeals for the Commission.[58] Any aggrieved party may, if he so chooses, appeal to the circuit court of the first judicial district of Mississippi. He must do so, however, within six months from the date of the final order or finding of which he is aggrieved. The procedure of appeal to the circuit court from the Commission is the same as that required in a regular appeal from the circuit court to the State Supreme Court.[59]

Appeals cannot be perfected without the filing of a bond to pay the cost of the appeal in the sum of five hundred dollars with two sureties, or with a surety company qualified to do business in Mississippi. A supersedeas bond on any appeal may be allowed by the Commission with such surety as the Commission considers sufficient. The Commission may require at any time an increase of any supersedeas bond that may be granted. A writ of supersedeas may be obtained from the judge of the first circuit court district upon application therefor within six months after the date of the order or judgment of the Commission appealed from. A supersedeas bond for the amount fixed by the judge of said circuit court district may then be filed. All appeal bonds and supersedeas bonds are made payable to the State.[60] Appeals from the judgment of the circuit court or decree of the chancery court may be taken as other appeals are taken to the Supreme Court,[61] and parties attacking an order of the Commission have the burden of showing unreasonableness of the order by clear and satisfactory evidence.[62]

In addition to the privileges of direct appeal, within ten days after the date of the order of the Commission an aggrieved party may have the entire proceedings removed to the circuit court of the first judicial

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[56]Miss. Code Ann. (1942) §§ 7683, 7699.
[57]Miss. Railroad Comm. v. Mobile and O. R. Co., 117 Miss. 257, 78 So. 153 (1918).
[58]Miss. Code Ann. (1942) § 7817.
[59]*Id.* §§ 7683, 7699.
[60]*Id.* § 7700.
[61]*Id.* § 7711.
[62]Miss. Railroad Comm. v. Mobile and O. R. Co., 115 Miss. 101, 75 So. 778 (1917).

district of the State for an examination of the record for errors of law by obtaining a writ of certiorari.[63]

Scope of Judicial Review

The Public Service Commission, being an administrative agency, does not have the power to render a final judgment or order.[64] Dean Kimbrough had the following to say in regard to judicial review of action by administrative agencies in Mississippi:

> The Mississippi Court has definitely established a liberal attitude in the much mooted matter of scope of judicial review. The position of the Court is clear; it will not substitute its own judgment on the facts for the findings of the administrative agency, unless injustice, arbitrariness and fraud are apparent in the finding. If a legal question is involved in the finding of the agency, it creates a sufficient necessity for a review of the finding by the court.[65]

The view that the Supreme Court will not substitute its own judgment on the facts for the findings of the Commission, unless injustice, arbitrariness and fraud are apparent in the finding was followed in a recent case.[66] Judicial review of orders of the Commission does not depend on whether the Commission was acting in a legislative, judicial, or executive capacity.[67]

The question of judicial review of the orders of the Public Service Commission is further clarified by the following statement of the Mississippi Supreme Court:

> . . . That a court of competent jurisdiction has the power to review any order made by an administrative commission to determine if it is supported by substantial evidence, within the meaning of that term, or is purely arbitrary or capricious, beyond the power of the Commission to make, or violates some statutory or constitutional right of an interested party is so

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[63]MISS. CODE ANN. (1942) §§ 7708, 7710.

[64]Western Union Telegraph Co. v. Miss. Railroad Comm., 74 Miss. 80, 92, 21 So. 15, 17 (1869): "The findings and determinations of matters committed to the Railroad Commission . . . are not final and conclusive, and it was never so intended by the statute . . . the reasonableness, and consequently the lawfulness of its determinations, is subject to judicial inquiry and decision."

[65]Kimbrough, *supra* note 36, at 140, 141.

[66]Tri-State Transit Co. v. Dixie Greyhound Lines, 197 Miss. 37, 19 So.(2d) 441 (1944).

[67]Dixie Greyhound Lines, Inc. v. Miss. Pub. Serv. Comm., 190 Miss. 704, 720, 200 So. 579, 582 (1941), *sug. error overr.*, 1 So.(2d) 489 (Miss. 1941): "To hold that appeals under the sections of the statutes of 1938 here involved can apply only to such orders of the Commission as are so judicial in character as to constitute judicial orders would violate the express language and practically destroy their efficacy, for the reason that comparatively few decisions of this tribunal are of that character."

> well settled as not to be open to any doubt . . . In reviewing such order "power to make the order, and not the mere expediency or wisdom of having made it is the question."[68]

Conclusions

The statutes regulating the procedure before the Public Service Commission and the judicial review of its decisions should be revised. The following suggestions are offered:

(1) The procedure should be revised so as to make it uniform in all instances that are the same from a practical procedural viewpoint.

(2) The statutes regarding notice before hearing should be revised to attain clarity with respect to the amount of time a litigant must be allowed in any case between notice and hearing, the method of serving notice, where it must be served, and what the notice shall contain. The writer is of the opinion that notice should be served exclusively by registered United States mail and that such notice should be effective whether inside or outside the State. This method of serving notice is equally as efficient as personal service yet it is more economical. Although more expensive than the use of ordinary mail, it is more efficient. The proposed general order, rule, regulation, or requirement should be included in substance in the notice as presently required of notice to a motor carrier.

(3) Statutes regarding the taking down and transcription of testimony should be revised to make it clearly mandatory that all testimony whether oral or written be taken down and transposed into an official record. This requirement would make it possible for the reviewing court to make a more just determination of whether the order of the Commission is supported by substantial evidence.

(4) A trial examiner of the type now used under the Motor Carrier Act should be provided in all cases in which he can be effectively used.

(5) Concise rules of evidence should be incorporated into the statute. The federal rules of evidence concerning administrative agencies of this kind tempered with the allowance of "official notice" should be adopted. Those facts of which official notice is taken and their source should be required to be entered into the official record so that judicial review will not be hampered.

W. D. Coleman

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[68]Dixie Greyhound Lines, Inc. v. Miss. Pub. Serv. Comm., 190 Miss. 704, 713, 714, 200 So. 579, 580 (1941), *sug. error overr.*, 1 So.(2d) 489 (Miss. 1941).

Mississippi Veterans' Legislation

Since the end of the first World War the State of Mississippi has given considerable attention to legislation designed for the aid and betterment of her sons and daughters who have served with the armed forces of the United States during periods of emergency. While there are at present a large number of statutes on the books concerning veterans and their affairs, not all of these statutes are of major importance and far-reaching effect. It shall be the purpose of this article to mention only briefly those of lesser importance, and to devote more consideration to those which will, in all probability, affect the veteran and the state in general for some time to come. While it would be impractical to go into any detailed comparison of Mississippi's laws with those of the other states of the nation, some mention will be made in various instances of the similarity to, or difference from, some of the statutes of various other states. Mississippi has not been a leader in the adoption of laws for the benefit of veterans, but it has by no means been a state on the other extreme of the scale in that respect.

Loans

Undoubtedly Mississippi's most outstanding piece of legislation for the benefit of her veterans is the Veterans' Farm and Home Purchase Act of 1936,[1] as amended in 1946.[2] This enactment by the legislature was one of the first of its type to be passed by the legislative body of any of the states, and is one of the few laws that will have noticeable far-reaching effect in the state. As far as can be ascertained, few states have passed anything that compares favorably with the Mississippi act. True, some states have laws providing for state aid in the securing of farms or homes by veterans, but these do not have the wide scope of the Mississippi statute.[3]

It will be of some possible value to briefly compare the provisions of our state law with the corresponding features of the federal Servicemen's Readjustment Act of 1944,[4] as amended in 1945.[5] The first inquiry of

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[1]Miss. Code Ann. (1942) §§ 7517-7532. The board set up for the administration of the act is designated as the veterans' farm and home board of the State of Mississippi, and is referred to both in the act and this article as the "board".

[2]Miss. Laws 1946, c. 221.

[3]La. Laws 1944, No. 32, provides that veterans may homestead state owned land, and that the time spent in service by the veteran will be deducted from the time ordinarily required to perfect title to the land. Colo. Stat. Ann. (1935) c. 134, §§ 101-114, provide that, in purchasing state owned land, a veteran will be given a credit of one dollar on the purchase price for each day spent in the service.

[4]38 USCA §§ 693-697.

[5]Pub. L. No. 268, 79th Cong., 1st Sess. (Dec. 28, 1945).

importance is the determination of who is eligible for a loan under the provisions of our act. It is provided that "Veteran" shall include any citizen of the United States, male or female; that the minimum of service required is that of sixty days on active duty in the army, navy, or marine corps of the United States between the dates of April 6, 1917, and November 11, 1918, or between September 16, 1940, and September 2, 1945; that the person, at the time of induction, must have been a bona fide resident of the United States of America who has lived in this state for two years immediately preceding December 7, 1941; and, further, that the term shall include the unmarried widow of a deceased male veteran. There are also provided certain exceptions,[6] but it is to be noted that there is nothing expressed in these or any other provisions of the act that will bar from eligibility one who is already receiving benefits from the federal government. The corresponding eligibility clause of the Servicemen's Readjustment Act of 1944 is as follows: "Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this title."[7]

Thus, at a glance it may be seen that on the whole the eligibility clause of the Mississippi statute is considerably broader in its scope than that of the federal act, and allows a much larger class of persons to avail themselves of the benefits to be derived therefrom. The Mississippi statute requires a minimum period of sixty days service, while the federal act requires active service of a minimum period of ninety days, unless, in the latter instance, the period was less than ninety days because of an injury incurred in the line of duty. Also it is to be noted that the Mis-

[6]Miss. Laws 1946, c. 221, § 2(a): "Veteran" includes . . . but does not include (1) any person at any time separated from the military or naval forces on account of alienage; (2) any person who has not been denied four percent loans by all recognized and lawful lending agencies within the county in which the home or farm lies; (3) any person who has received the benefits under this act or is receiving from another state a bonus, compensation or benefit, the prerequisite of which is service in the army, navy or marine corps of the United States, which service is the basis for the claim for benefits under this act; . . .

[7]Pub. L. No. 268, 79th Cong., 1st Sess. (Dec. 28, 1945). It will be noted, however, that eligibility has been extended by Title III, § 10 of this law, to include persons who served in the armed forces of allied governments, who were citizens of the United States at the time of entry into that service, provided that such benefit shall not extend to any person not a resident of the United States at the time of filing claim, or to any person who has applied for and received the same or similar benefit from the government of the nation in whose active military service he served.

sissippi statute is available to veterans of the period from April 6, 1917, through November 11, 1918, as well as to veterans of the war just past.

In respect to the purpose for which a loan may be secured, however, the provisions of our statute are not as extensive as those of the federal act. It is clear that under the Mississippi law the loan can only be for the purpose of purchasing (1) a farm, or (2) a home, *i.e.*, a dwelling already in existence,[8] while under the federal act the loan may be secured (1) to purchase, construct or repair a home, (2) to purchase a farm, construct and/or repair necessary buildings on a farm, or (3) to purchase a going business, business real estate, and/or fixtures and equipment necessary for the operation of the business.[9] Since the Mississippi statute is not as broad in this respect as is the federal act, any further comparison of the two will be limited to the provisions in which the two are alike.

Next come the basic monetary provisions of the statute. The purchase price of the property to be bought for the veteran may not exceed the sum of $5,000.00, with the further provision that the purchase of the property may not entail a greater cost than $4,000.00 to the board set up for the purpose of securing the property for the veteran. That leaves, then, a difference of $1,000.00, which is the maximum sum which may be advanced by the veteran himself.[10] The net result of this section is that the State of Mississippi advances, for the veteran, up to the sum of $4,000.00, and enables him to secure property up to a maximum value of $5,000.00, while the federal act provides a government guaranty of fifty per cent. of the total loan, and limits the maximum amount of the guaranty to the sum of $4,000.00. Consequently, the provisions of the federal act allow a total purchase price $3,000.00 greater than that allowed by the statute of Mississippi.

There remains only one other feature of comparison that should be pointed out, and that relates to the period of time allowed for the repayment of the loan and the rate of interest payable under the two laws being considered. The Mississippi statute provides that the amortization of the loan may not extend over a period of years greater than twenty-five, and that the rate of interest may not exceed four per cent.[11] The federal act provides that the period of repayment may not exceed twenty-five years, except that in the case of loans on farm realty the

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[8]Miss. Laws 1946, c. 221, § 2(d).
[9]38 USCA §§ 694a-694c.
[10]Miss. Laws 1946, c. 221, § 7.
[11]*Id.* § 9.

period may run to forty years, and that the rate of interest may not exceed four per cent.[12]

Once the applicant has been determined eligible under the provisions of the Mississippi act, and has been authorized by the board to select the farm or home he desires, such selection shall be submitted to the board. The board, if satisfied of the desirability of the property selected, and that the applicant has agreed to actually reside upon the property within sixty days from the date of purchase, and that the purchase price of such property to the board does not exceed the stipulated sum of $4,000.00, is then empowered to purchase said property from the owner upon such terms as they shall agree. The board may enter into a contract with the veteran for the sale of the property to the veteran, and shall fix the selling price of the property, taking into consideration such items and expenses incurred by the board in appraisals, examination of title, etc. The purchaser must make an initial payment of at least ten per cent. of the selling price of the property; the balance of the selling price may be amortized over a period of years as fixed by the board, but not to exceed twenty-five years in any case, together with interest thereon at the rate of four per cent. per annum.[13]

Other noteworthy provisions of the act are as follows: The board may, when they deem it necessary, postpone the whole or any part of any installment due upon the purchase price.[14] The property may not be transferred, assigned, encumbered, leased, let or sublet, without the written permission of the board, until the purchaser has paid at least one-third of the purchase price of the property.[15] The contract between the board and the purchaser must provide that the purchaser shall keep the premises in good repair, and the purchaser may be required to adequately insure the buildings and other permanent improvements upon the property.[16] When the purchaser has paid twenty-five per cent. of the purchase price the board shall execute a general deed of the premises to the purchaser, and take a trust deed to secure the balance due.[17] If the purchaser fails to pay all taxes and assessments, or other charges that are a lien upon the property, or maintain the premises in good repair, the board may do so and add such expenditures to the balance due; the same to draw interest at the rate of six per cent. from the date of expenditure.[18] If the

[12]Pub. L. No. 268, 79th Cong., 1st Sess. (Dec. 28, 1945), Title III, § 8.
[13]Miss. Laws 1946, c. 221, § 9.
[14]*Ibid.*
[15]*Ibid.*
[16]Miss. Laws 1946, c. 221, § 12.
[17]*Id.* § 13.
[18]*Id.* § 14.

purchaser defaults under the contract, the board may repossess the property and dispose of it as they see fit to any person or persons, but not to a corporation.[19] When a purchaser dies, his rights devolve upon his heirs, devisees or personal representatives, but subject to all claims and charges of the board.[20] If a veteran dies after filing application for the benefits of this act, and his application is subsequently approved, his widow may, in the discretion of the board, succeed to his rights.[21]

One of the more important features of this statute is the provision allowing minors to take advantage of the benefits thereof. For this purpose it is provided that the disability of any person, otherwise qualified under this act, who is below the age of twenty-one years and above the age of eighteen years is removed to authorize eligibility and enjoyment of the benefits.[22] There has been no question as to the validity of this particular provision of the statute in Mississippi, but a similar enactment has been questioned and declared constitutional elsewhere.[23]

Wills

Another notable statute enacted by the Mississippi legislature is that one dealing with the manner of proof and admission to probate of wills executed by a person serving in the armed forces of the United States during the recent war.[24] The statute, in and of itself, is relatively simple and explicit in its terms. Its provision is for an additional manner in which the wills of servicemen may be admitted to probate, *i.e.,* it is supplemental to the ordinary manner of proof and probate. It provides that the will of any member of the armed forces of the United States during the recent war may be admitted to probate on the affidavit of any reliable person or persons sufficient to satisfy the chancellor that the testator is dead, that the writing offered is the last will and testament of such testator, that the affidavit or testimony of the subscribing witnesses is not readily obtainable, and that there is good reason that the will be then probated. This is a noticeable relaxation of the provisions of the code in relation to the normal manner of admission to probate.[25]

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[19]*Id.* § 15.
[20]*Id.* § 18.
[21]*Id.* § 19.
[22]*Id.* § 23. A similar enactment is Miss. Laws 1946, c. 321. It provides for removal of minority disability of any veteran and his spouse who are desirous of taking advantage of the guaranty or insurance loan feature of the Servicemen's Readjustment Act of 1944.
[23]Valley Nat. Bank v. Glover, 159 P.(2d) 292 (Ariz. 1945).
[24]Miss. Code Ann. (1946 Supp.) § 501-01.
[25]Miss. Code Ann. (1942) §§ 498-500.

Numerous other states have recently enacted similar statutes, but few are to be found which are relaxations of the ordinary manner of probate to the extent of the Mississippi statute; the principal difference is that in other states the number of persons required to make affidavit as to the genuineness of the instrument is often specified in the law.[26] It is to be noted, however, that the Mississippi law does not specify or require any set number of persons to make affidavit, it merely stating "on the affidavit of any reliable person or persons . . ."

While the provisions of this statute present no problem of themselves, they do raise some interesting questions on the related subject of who may execute wills. We know that the general provision is that wills may be executed by any person "aged twenty-one years", in addition to the requirement of "sound and disposing mind", etc.[27] But, what then of the person serving in the armed forces of the United States who was under the age of twenty-one years? Would the will of such a person be admissible to probate under the recent act of 1944? So far as has been determined, no answer to these questions may be found in the judicial decisions of Mississippi, but the possible answer may be found by reference to the so-called Soldiers' and Sailors' Act.[28] At least one state has considered this problem, and has adequately taken care of that situation by statutory provision.[29]

Guardianship

Mississippi's legislation dealing with the guardianship of veterans consists of the Uniform Veterans' Guardianship Act,[30] a uniform law which has been enacted by most of the states of the nation.[31] This act is designed for the protection of veterans of the state, as well as for aiding veterans in securing benefits due them. The first provision of the statute is that whenever it is required by the Director of the United States

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[26]N. C. Laws 1943, c. 218, provides that the will may be admitted to probate on the oath of three credible witnesses. Iowa Laws 1945, c. 225, requires the affidavit of two credible dis-interested witnesses.

[27]Miss. Code Ann. (1942) § 657.

[28]*Id.* § 666. "Any soldier in actual service, or any marine being at sea, may dispose of and bequeath his goods and chattels as he might heretofore have done, anything in this chapter to the contrary notwithstanding." For a comprehensive note on this subject, see 137 ALR 1310, cited in the annotation to this statute.

[29]Ariz. Laws 1945, c. 49. This statute provides that persons serving in the armed forces of the United States who are eighteen years of age, or above, may execute wills which will be admitted to probate in that state.

[30]Miss. Code Ann. (1942) §§ 7493-7511. § 7506 was amended and enlarged by Miss. Laws 1946, c. 176.

[31]Thirty-six states have adopted the act with some slight modifications. Those which had not adopted it up until the end of the year 1945 were Missouri, Washington, Massachusetts, Virginia, Illinois, Wisconsin, Minnesota, Connecticut, Texas, Oregon, Delaware, and Pennsylvania.

Veterans' Bureau that a guardian be appointed for a beneficiary of the Bureau, the same shall be done in accordance with the provisions of this act.[32] The next following provisions are concerned with the details of the process for appointing a guardian, providing, among other things, that where there is filed with the petition for appointment of a guardian a certificate of the Director showing that the beneficiary is a minor, and that appointment of a guardian is a condition precedent to the payment of moneys due the minor by the Bureau, such will be prima facie evidence of the necessity for the appointment of the guardian.[33] The same stipulation is made in regard to a person already rated mentally incompetent by examination of the Bureau.[34] Other procedural provisions include the usual requirement of bond for the guardian, the filing of annual accounts with the court and removal for failure to file such accounting, compensation allowed the guardian for his services, and restrictions upon the use of the ward's estate by the guardian.[35]

It is provided also that whenever any copy of a public record is required by the Bureau in the processing of a claim for benefits available from the Bureau, such copy is to be provided to the applicant or his representative without charge.[36]

The only other provision of this act of noteworthy importance is the one dealing with the commitment of a person alleged to be a lunatic, insane person, idiot, fool, or otherwise of unsound mind, or otherwise in need of confinement in a hospital for his proper care and treatment.[37] Whenever it is determined after such adjudication of the status of such a person that it is necessary he be committed to an institution, and it has been ascertained that the person is eligible for care or treatment by the Veterans Administration, and the court has ascertained that there are facilities available, the court may order the person committed to the proper insitution. The person whose commitment is sought under this act shall be personally served with notice of the proceeding, and nothing shall affect his right to appear and be heard in the proceeding. Once the person has been committed, the chief officer of the facility shall have, in respect to that person, the same powers as superintendents of state hospitals for mental diseases within the state with respect to retention of custody, transfer, parole or discharge. It has been held by the Supreme Court of the state that this statute does not authorize the commitment

[32]Miss. Code Ann. (1942) § 7494.
[33]*Id.* § 7497.
[34]*Id.* § 7498.
[35]*Id.* §§ 7500-7504.
[36]*Id.* § 7505.
[37]*Id.* § 7506, as amended by Miss. Laws 1944, c. 176.

of such a person to a federal hospital by the circuit court when the person is before that court charged with a capital offense.[38]

It is further provided that full force and effect shall be given to the judgment or order of commitment by a court of competent jurisdiction of another state; that the courts of the committing state shall be deemed to retain jurisdiction of the person so committed; and that consent is given to the application of the law of the committing state as respects the authority of the chief officer of the facility in relation to the person committed.

Also, upon receipt of certificate of the Veterans Administration that facilities are available for the care and treatment of those eligible persons who may have been previously committed to the state insane hospital, or any other institution for the care and treatment of the insane, the superintendent of such hospital may cause the transfer of the person to the proper facility, and give notice of the transfer to the committing court. But, no person shall be transferred under this provision if he is confined pursuant to conviction of a felony or misdemeanor, or if he was acquitted of such a charge solely on the ground of insanity, unless the court originally committing the person enter an order for the transfer after appropriate motion and hearing.

There is one other statute dealing with guardianship, it being a more recent act, and one wholly disconnected from the foregoing act.[39] This act provides for the appointment of a guardian, under certain circumstances, and upon proper procedure before the court, for the estate of a person serving in or with the armed forces of the United States, when such a person is officially reported as missing, missing in action, interned in a neutral country, beleaguered, beseiged, or captured by an enemy. The act is applicable where such a person has no attorney-in-fact, and next of kin of the person missing, etc., shall be given preference for the appointment. The guardian may be discharged upon petition by the absentee, or an attorney-in-fact, or in case of established death of the absentee and the appointment of an executor or administrator.

Although not actually a part of the guardianship act just discussed, the act providing for the creation and filling of the office of State Service Commissioner[40] is one closely related to that subject. That act provides for the creation of the office, and the appointment of the commissioner

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[38]Doggett v. State, 165 Miss. 488, 144 So. 854 (1932).

[39]Miss. Laws 1946, c. 309.

[40]Miss. Code Ann. (1942) §§ 7486, 7487, as amended by Miss. Laws 1944, c. 175.

by the governor. It is prescribed that the duties of that officer shall be to aid all residents of the State of Mississippi who served in the military or naval forces of the United States during the Spanish-American war, World War I and all wars since the year 1898, their relatives, beneficiaries or dependents, to receive from the United States any and all compensation, hospitalization, insurance, or other aid and benefits to which they may be entitled. Also, to aid the United States to defeat all unjust claims for such aid or benefit.[41]

Exemptions from Taxes and Fees

A number of acts provide for the exemption of veterans and servicemen from the payment of certain taxes and fees ordinarily required. Since these are generally clear and concise, it is not necessary to do more than briefly mention these particular statutes and the main provisions of each. The first to be noted is one affecting all veterans of the state, it being a statute providing for the recordation of discharges and certificates of service.[42] This act provides that all chancery clerks shall record without any cost whatsoever to any person of the armed forces of the United States residing in the same county as the chancery clerk, all honorable discharges and certificates of service of any and all members of the armed forces of the United States; and further, that the chancery clerk shall furnish certified copies of the same when requested by the veteran, his dependents or authorized representative without cost.

Another act affecting many of the veterans and servicemen deals with taxable income.[43] It provides that the term gross income shall not include any compensation received through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States; also the salaries, wages, or compensation received from the United States government by persons who are members of the military or naval forces of the United States are not taxable.

Of importance to a limited class of veterans and servicemen is the statute concerning homestead exemption.[44] By this it is provided that a home owned by a person and actually occupied by him as a residence at the time of his induction, the home being eligible for homestead exemption at that time, may continue eligible for such homestead exemption during his term of military or naval service, even though it may be rented

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[41] *Id.* § 7488, as amended by Miss. Laws 1944, c. 175.
[42] Miss. Code Ann. (1944 Supp.) § 7516.
[43] *Id.* § 9227.
[44] Miss. Code Ann. (1942) § 9723.

to tenants. The procedure for taking advantage of the act is prescribed therein. This statute was amended by the last session of the legislature so as to augment the benefits thereof.[45] The provisions of the amendment are such as to allow the benefits of homestead exemption to persons inducted into the armed forces who failed to file application for exemption, or failed to file with the assessor a certificate of induction, during the time they were in the service. To come within the class of persons for whom the amendment was designed one must have been inducted on or after January 1, 1942, and not after December 31, 1945. The amendment sets out the procedure to be followed by an eligible person, and provides for repayment of the amounts paid as taxes on the property during the time of service.

Poll tax exemption has also been the subject of recent legislation in Mississippi, having been dealt with in two statutes.[46] The first of the two acts provides for the exemption from payment of poll taxes of those persons serving in the armed forces during the recent war, and authorizes such persons to vote by absentee ballot and without payment of poll tax for which they would have otherwise been liable had they not been inducted into the service. The procedure for handling of the absentee ballots is prescribed, and the act defines the term armed services to include the army, navy, marine corps, nurses corps, coast guard and geodetic survey. It is provided that this act shall be automatically repealed when the war shall end and six months thereafter.[47] The second of the two acts is provision for exemption from payment of poll tax of certain discharged members of the armed forces, for the years 1944 and 1945. It allows a discharged person to vote in any primary election if he or she has all other qualifications, and if he or she had no opportunity to pay poll tax for 1944 and 1945 because of such service. The procedure for obtaining the benefit of the act is set out, and the act further stipulates that it shall apply to members of the Merchant Marine and the American Red Cross, as well as all other ordinary arms of the military service.

Several other statutes need only be briefly mentioned. It is provided by one act that the Bureau of Vital Statistics shall furnish free copies of birth and death certificates when they are required in the adjudication of veterans' claims before the Veterans Administration, if the request is accompanied by a statement from a service officer, or officer of the Veterans Administration, to the effect that the veteran desiring same is un-

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[45]Miss. Laws 1946, c. 197.
[46]Miss. Code Ann. (1944 Supp.) § 3199; Miss. Laws 1946, c. 441.
[47]Miss. Code Ann. (1942) § 3203.

able to pay the fifty cent fee for each copy.[48] Another provides that no resident of the State of Mississippi who is a member of the armed forces shall be required to purchase a hunting or fishing license.[49] Another exempts members of the bar from the payment of dues to the State Bar Association during their term of service.[50] While the statute dealing with privilege tax exemptions[51] does not refer to war veterans, it has been ruled by the Attorney General that if the disability of a war veteran is such that he may be classed as a "disabled or infirm" person, then he would be entitled to the privileges granted by the act.[52]

Aid through Municipalities and Counties

The greater part of the aid to be given veterans and servicemen through municipalities and counties is provided in statutes authorizing those agencies of government to take certain steps to render such aid, but generally those statutes do not require that something be done; they only make the matter optional with the agencies. Of such character is the act authorizing the various boards of supervisors to create and fill the office of county service officer, and providing that the duties of that officer shall be to aid all veterans, their relatives, and dependents in claims for benefits available, and general veterans affairs.[53] This act is optional with the particular board of supervisors, and has not been acted on by many of the boards of the state.

Another act of this type authorizes any municipality, town or county to rent, lease, purchase or construct buildings for the purpose of housing the various units of congressionally chartered veterans' organizations and their auxiliaries.[54] The act further provides for the acquisition of land for that purpose, and for the issuance of bonds and notes for that acquisition.

Further provisions in the matter of housing are contained in an act authorizing municipalities to contract with the United States whereby the United States will agree to furnish housing facilities for distressed families of servicemen and veterans unable to secure housing, at the expense of the United States; and the municipality may agree to furnish the site for such and to provide sanitary sewerage, streets, and utilities.[55] This

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[48] *Id.* § 7515.
[49] MISS. CODE ANN. (1944 Supp.) § 5871-01.
[50] MISS. CODE ANN. (1942) § 8698.
[51] MISS. CODE ANN. (1944 Supp.) § 9678.
[52] OPS. ATT'Y. GEN., 1929-31, p. 244.
[53] Miss. Laws 1946, c. 221, § 6.
[54] MISS. CODE ANN. (1944 Supp.) § 7513-01.
[55] Miss. Laws 1946, c. 393.

act had in view the furtherance of the federal act known as the Lanham Act.[56]

Similar to the last two mentioned laws, another provides that any municipality may convey and grant land owned for public purposes to the United States for any consideration deemed sufficient, when the purpose of the grant is to allow the United States to use the land for a veterans hospital or soldiers home, or any other purpose connected with the care of veterans of the various wars of the United States.[57]

Benefits to Veterans' Organizations

Some benefits to veterans' organizations have already been mentioned in connection with aid through municipalities and counties, particularly those concerned with the housing of organizational units and their auxiliaries. Further benefit to those organizations is given in a statute conferring upon the post service officers of the various posts of these organizations full power to administer oaths and affirmations and to take acknowledgments, and to perform all other duties required of notaries public in connection with matters affecting veterans and their heirs or dependents, in claims against the United States. It is stipulated that no charge may be made for such service, and that no bond shall be required of such officers, their commission being issued free of charge.[58]

Miscellaneous Acts

Only a few more acts remain to be considered, and these are of such character as to be of benefit to a limited number of persons. One act in this category has already expired, but its effect still remains in many instances.[59] The provisions of this law were to allow acknowledgments to instruments requiring such to be taken before any commissioned officer of the armed forces when the person executing the instrument was at the time on active duty in the military or naval forces. It also provided for the validation of such instruments and acknowledgments so taken prior to the passage of the act. The act automatically expired on April 1, 1946.

Provision was made for retirement credit to teachers who served in the armed forces of either World War I or World War II.[60] By this act full credit is to be given for time spent in the service, such credit to

[56]Oct. 14, 1940, c. 862, 54 STAT. 1125; latest amendment, July 3, 1945, c. 264, §§ 1, 2, 59 STAT. 383.
[57]MISS. CODE ANN. (1942) § 7512.
[58]*Id.* § 7514.
[59]Miss. Laws 1946, c. 166.
[60]MISS. CODE ANN. (1944 Supp.) § 6294-04.

be based on the salary received at the time of induction into the armed services, or the scholastic year immediately preceding such service.

Civil service commissions for certain municipalities was the subject-matter of a recent statute.[61] The act provided for the creation of civil service commissions in all municipalities operating under a commission form of government, and having a population of not less than 14,000, and having full time fire and police departments having paid members. The provision was made that those persons who had previously left their positions to participate in the armed services of the United States should have preference in re-employment, and enjoy the rights and privileges of the act as though their service had not been terminated. Persons serving as extra members of such departments mentioned in the act are subject to removal for replacement by those persons serving in the armed forces.

The state took steps to aid and facilitate educational benefits to veterans under the G. I. Bill by providing certain funds to be expended for the purpose of helping to defray the initial cost of providing satisfactory and suitable accommodations, materials, supplies, equipment and instruction in all sorts of educational and vocational institutions of the State of Mississippi.[62] Another act related to the foregoing one created a vocational and educational revolving fund for use by the institutions of higher learning and public junior colleges of the state, or other qualified educational institutions.[63]

Provision for the preservation of unemployment compensation benefit rights of persons in the military or naval service of the United States was made early in the war,[64] and was subsequently extended.[65] The act applies to those serving in the armed forces or of any organization affiliated with the defense of the United States or of this state since April 1, 1940, whose continued service was not less than ninety days and whose service was terminated on or before January 1, 1947.

One other act, although of direct rather than indirect benefit, will be of interest and benefit to a very limited number of persons. This act is one providing for the transfer of certain state owned land, situated in Hinds County, to the State Building Commission, to be developed by that commission into a residential subdivision, and the lots thereof to be

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[61] *Id.* § 3825-08.
[62] Miss. Laws 1946, c. 368.
[63] *Id.* c. 184.
[64] Miss. Code Ann. (1942) § 7446.
[65] Miss. Code Ann. (1944 Supp.) § 7446.

sold to veterans of World War II.[66] The rules imposed provide that not more than one lot may be sold to any veteran, that the purchaser must have a bona fide intent to build thereon, and that such lot may not be resold within eighteen months of the effective date of the act, except to another honorably discharged veteran, and then at no more than the cost of the lot and improvement plus five per cent.

James S. Dale, Jr.

[66]Miss. Laws 1946, c. 484.

RECENT DECISIONS

Adverse Possession—Burden of Proof

The county of Itawamba filed its bill to remove cloud upon the title to certain property used for school purposes. The county based its claim upon an adverse possession extending back for a period "beyond the memory of man now living." Evidence showed that the property had been used by the county for school purposes for eighty years. The defendant urges that the county was holding the property permissively, claiming a dedication of the property for school purposes by one of his predecessors in title. Defendant holds documentary title running back to a government patent. Held: The defendant had the burden of establishing that original occupancy was permissive. *Itawamba County v. Sheffield,* 195 Miss. 359, 13 So. (2d) 649 (1943).

It has frequently been asserted that the person claiming title by adverse possession has the burden of proving that his possession was hostile or adverse.[1] This follows the general rule that the one claiming protection of the statute of limitations has the burden of proving that the statute inures to his benefit.[2] It is universally held that the burden of proof in the sense of the risk of non-persuasion is upon the one claiming under the statute of limitations, but there is a conflict of authority as to who has the burden of going forward with the evidence.[3] Generally, the presumption is that possession is subordinate to the legal title,[4] putting the burden of producing evidence on the one claiming adverse possession. However, a number of courts hold that unexplained, exclusive possession for the statutory period

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[1]Lovejoy v. McKibben, 113 Miss. 369, 74 So. 281 (1917); Neal v. Newburger Co., 154 Miss. 691, 123 So. 861 (1929); Weeping Water v. Reed, 21 Neb. 261, 31 N.W. 797 (1887); Alexander v. Wheeler, 69 Ala. 332 (1881); Shuffleton v. Nelson, 2 Sawy. 540 (C.C.D.Ore. 1874); DeHaven v. Landell, 31 Pa.St. (7 Casey) 120 (1858); Howard v. Howard, 17 Barb. 663 (N.Y. 1854); Tubb v. Williams, 26 Tenn. (7 Humph.) 367 (1846); Gourdine v. Fludd, Harp. 232 (S.C. 1824); Cantey v. Platt, 2 McCord 260 (S.C. 1822); Hawk v. Senseman, 6 S.&R. 20 (Pa. 1820).

[2]9 Wigmore, Evidence (3d ed. 1940) § 2538; 2 Jones, Evidence (2d ed. 1926) § 558.

[3]Every presumption of law is that the occupant holds in subordination and not adversely to the true owner. Davis v. Bowmar, 55 Miss. 671 (1878). A title by possession is never presumed—it must be actually proved. Holmes v. Rochell, 2 Bay 487 (S.C. 1803). Strict proof has always been required, not only that the first possession was taken under claim hostile to the real owner, but that such hostility has existed on the part of succeeding tenants. Brandt v. Ogden, 1 Johns. 156 (N.Y. 1806). He must show extent of his possession and that it was adverse. Cantey v. Platt, 2 McCord 260 (S.C. 1822). The burden of proof of adverse possession is upon the one relying thereon. Gourdine v. Fludd, Harp. 232 (S.C. 1824). Mere possession by claimant did not suffice to put burden of proof on titular owner to show that possession to be permissive—the burden of showing adverseness was on claimant throughout. Brown v. King, 5 Metc. 173 (Mass. 1842). He must establish his claim affirmatively and not leave it to inference. Howard v. Howard, 17 Barb. 663 (N.Y. 1854).

Burden of going forward with the evidence is on the titular owner. Carey v. Goodman, 22 N.Y. 170 (1860). Open and exclusive occupation for more than twenty years, unexplained, establishes title. Wollmann v. Ruehle, 100 Wis. 31, 75 N.W. 425 (1898). Presumption is that the holding is adverse. Oveg v. Morrison, 142 Wis. 243, 125 N.W. 449 (1910). Presumption is that possessor is holding under claim of right, and burden is on one claiming to the contrary. Rock Springs v. Strum, 39 Wyo. 494, 273 P. 908 (1929).

[4]Neal v. Newburger Co., 154 Miss. 679, 123 So. 861 (1929); Davis v. Bowmar, 55 Miss. 671 (1878).

extinguishes the presumption of occupancy in subordination to the right of the true owner and creates a presumption of holding during such period with all the characteristics of adverse possession, subject to being rebutted by evidence to the contrary, but conclusive in the absence of such evidence.[5] Since the element of adverseness or hostility merely involves the absence of recognition of the legal title, it would seem that the lack of hostility, rather than the presence thereof, is the affirmative fact to be proved.[6] Knowing or having reason to know that his land is in the possession of another, the true owner should be barred by reason of his failure to assert his own right of possession, unless he can show that he was induced to do so by the possessor's recognition and admission of his rights. The burden, therefore, in the sense of producing evidence, should shift to the holder of the documentary title as soon as the one claiming adverse possession has introduced evidence of his possession of the land for the required statutory period.[7] The Mississippi Court has gone so far as to shift the burden of producing evidence at this stage of the case to the defendant,[8] but in the principal case the court held that since the plaintiff had proved the adverseness of his possession, the defendant had the burden of producing evidence that the use by the plaintiff was permissive. Upon failure of the defendant to produce such evidence, the court held that the adverse possession proved by the plaintiff should prevail.

—*James T. Bridges*

Constitutional Law—Interstate Commerce—State Tax Statute Discriminating Against Foreign Insurance Corporation

Nonresident mutual insurance companies, authorized to do business in Mississippi, were required by statute[1] to pay an annual privilege or premium tax equal to two and one-fourth per cent of the gross premiums received from policies written or covering risks in this state, whereas local companies were required to pay a tax of only one-half that amount, against which their ad valorem taxes were credited or taken into account. Complainant insurance company attacked the statute as violating the Commerce Clause of the U. S. Constitution and the Due Process Clause of the Mississippi Constitution. Held: Although the tax was unequal and discriminatory, this inequality did not render the statute unconstitutional. *Prudential Ins. Co. of America v. Barnett,* 27 So. (2d) 60 (Miss. 1946).

Prior to 1943 the Mississippi Court would have followed those decisions which resulted from the holding in *Paul v. Virginia,*[2] which case decided that the business of insurance was not interstate commerce, thus that states could impose their own terms on the admission of a foreign corporation. The courts followed this opinion for 74 years, allowing foreign insurance companies to be subjected to local regula-

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[5]Davis v. Bowmar, 55 Miss. 671 (1878); Rock Springs v. Strum, 39 Wyo. 494, 273 P. 908 (1929); Oveg v. Morrison, 142 Wis. 243, 125 N.W. 449 (1910); Skinner v. Skinner, 38 Neb. 756, 57 N.W. 534 (1894); 9 Wigmore, Evidence (3d ed. 1940) § 2515.

[6]4 Tiffany, Real Property (3d ed. 1939) § 1144.

[7]Miss. Code Ann. (1942) §§ 709, 711.

[8]Davis v. Bowmar, 55 Miss. 671 (1878).

[1]Miss. Code Ann. (1942) § 9537. Note that after the instant case arose, this section was amended by Miss. Laws 1946, c. 357.

[2]8 Wall. 168, 19 L.Ed. 357 (U.S. 1869).

tion, taxation, and even discrimination.[3] Then in 1943 the U. S. Supreme Court, in the case of *Southeastern Underwriters Association v. U. S.*,[4] held the business of insurance to be interstate commerce, due to the numerous interstate transactions involved, and thus subject to regulation by Congress under the Commerce Clause. Former cases on the insurance business[5] had implied very strongly that if this business were classified as interstate commerce, such a discriminatory tax as was imposed by Mississippi would be clearly unconstitutional. Cases involving similar taxes levied on other types of business constituting interstate commerce held that the Commerce Clause by its own force prohibits *any* discrimination against interstate commerce, whatever its form or method, and that forms of state taxation whose tendency is to place it at a disadvantage to intrastate commerce are an exercise of the state taxing power in an unconstitutional manner.[6]

These cases would seem to indicate that the courts would now be forced to readjust their concepts of the protection to be given to foreign insurance corporations, but this logical development has not followed. Rather, in deciding subsequent cases of a similar nature, courts have relied on a theory advanced in the *Southeastern Underwriters* case to the effect that, although certain activities of a business may be interstate, other of its activities are so related to local welfare that it is to the public interest that they be subject to state regulation and taxation.[7] The result has been that the cases decided since the *Southeastern Underwriters* case have not extended to the foreign insurance corporations any greater protection than they enjoyed before that case was decided.

Nor has the Congressional legislation, which it had been pointed out[8] would follow that case, seemed to relieve these companies of discriminatory taxes and regulation, for in March, 1945, the President approved the McCarran-Ferguson Act[9] which in effect has allowed the continued regulation and taxation by the states of the business of insurance. In fact, statements made by the proponents of the Act during the course of proceedings on the bill[10] seem to indicate a desire on the part of Congress to leave the states with the same powers of regulation and taxation they possessed prior to the *Southeastern Underwriters* case. In a case decided after this act was passed,[11] a state court, after holding that the Act had not invalidated state laws on the subject, suggested that perhaps that case prompted Congress to pass such an act. It was also indicated that the Act was an invitation to the states to legislate in good faith.[12] It is interesting here to note that in 1945

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[3]New York Life Insurance Company v. Deer Lodge County, 231 U.S. 495, 34 S.Ct. 167, 58 L.Ed. 332 (1913); Philadelphia Fire Association v. New York, 119 U.S. 110, 7 S.Ct. 108, 30 L.Ed. 342 (1886); Ducat v. Chicago, 10 Wall. 410, 19 L.Ed. 972 (U.S. 1871).

[4]U.S. v. Southeastern Underwriters Association, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1943).

[5]See cases cited *supra* note 3.

[6]Best & Co. v. Maxwell, 311 U.S. 454, 61 S.Ct. 334, 85 L.Ed. 275 (1940); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct 388, 84 L.Ed. 565 (1939); Webber v. Virginia, 103 U.S. 344, 26 L.Ed. 565 (1880); Welton v. State of Missouri, 91 U.S. 275, 23 L.Ed. 347 (1875).

[7]Ware v. Travelers Insurance Co., 150 F. (2d) 463 (C.C.A. 9th, 1945).

[8]First Nat. Ben. Soc. v. Garrison, 58 F.Supp. 972 (S.D. Cal. 1945).

[9]59 STAT. 33 (1945), 15 U.S.C.A. § 1011.

[10]91 CONG. REC. 1470 (1945).

[11]*In re* Insurance Tax Cases, 160 Kan. 300, 161 P. (2d) 726 (1945).

[12]91 CONG. REC. 1554 (1945).

twelve states[13] passed laws eliminating discrimination against foreign insurance corporations, and that the Mississippi Legislature, while the *Prudential Insurance Co.* case was pending, passed a bill[14] providing that the rate of taxation of foreign and domestic insurance companies shall be the same.

In cases arising since the passage of the McCarran-Ferguson Act, the Supreme Court of the U. S. has held that a state may impose on a foreign insurance corporation more onerous conditions for the privilege of doing business within that state than it does on domestic corporations.[15] It has also decided that the Act, though sanctioning such state legislation, does not violate the Due Process Clause, nor does it amount to an unconstitutional delegation by Congress of its power to the states.[16]

It is thus submitted that in view of the line of decisions on discriminatory taxation of interstate commerce a contrary result would seem more logically to follow, yet the Mississippi Supreme Court was following the current trend of both the federal and state court decisions in holding that the Mississippi statute, even though discriminatory, is not unconstitutional.

—*Roger C. Landrum*

Homestead—Actual Occupancy Required—What Interest Necessary to Support Exemption

Bill Davis lived with his brother on his brother's eighty acre farm. Bill's wife and daughter lived in Gulfport except when visiting him. In 1940 and 1942, Bill bought land adjoining the farm of his brother so that he had eighty acres lying immediately west of his brother's eighty acres. In 1943 Bill executed an oil and gas lease on forty acres of his land. His wife did not join in the lease. From 1938 until the time of the conveyance Bill lived with his brother and worked as a day laborer. Prior to the conveyance there was no structure of any kind on the eighty acres and some calves and a hog or two belonging to Bill roamed over the eighty acres. Suit was brought to remove the oil and gas lease as a cloud on the title to the forty acres. It was claimed that the forty acres was a part of Bill's homestead and the conveyance thereof was invalid because it was not joined in by the wife. Held: Bill could not claim the eighty acres as his homestead since he did not actually occupy the land; he could not link the occupancy of the land on which he did reside with the eighty acres he owned in fee because he had no interest in the land on which he resided. *Davis et al. v. Davidor et al.*, 27 So. (2d) 371 (Miss. 1946).

In some jurisdictions where actual occupancy of the premises is not required by statute it is held that present right of occupancy or possession coupled with the present intention to occupy the premises will give the claimant a homestead exemption, provided such intention to occupy be manifested by such acts as to clearly indicate that the premises are to be occupied within a reasonable time.[1] It is provided

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[13]Arizona, Arkansas, Iowa, Maine, Missouri, New Hampshire, New Mexico, Oregon, South Dakota, Tennessee, Washington, West Virginia.

[14]Miss. Laws 1946, c. 357.

[15]Lincoln National Life Insurance Co. v. Read, 325 U.S. 673, 65 S.Ct. 1220, 89 L.Ed. 1861 (1944).

[16]Prudential Insurance Co. v. Benjamin, 66 S.Ct. 1141. 90 L.Ed. 1023 (U.S. 1946).

[1]Haight v. Reynolds, 257 Mich. 11, 239 N.W. 880 (1932); Davis v. Flowers, 174 Okla. 557, 51 P. (2d) 534 (1935); W. R. Thompson & Sons Lumber Co. v. Clifton, 132 Tex. 366, 124 S.W. (2d) 106 (1939).

by statute in Mississippi that the premises claimed as a homestead must be owned and occupied as a residence by the person claiming the exemption.[2] This statute has been strictly construed by the Court.[3] For this reason the Court in the present case did not discuss the sufficiency of the preparatory acts to construct a residence and the intention of the claimant to move onto the premises.

The Court has held that where the claimant occupies contiguous tracts of land, both tracts may be considered a part of the homestead even though the interest of the claimant in the contiguous tracts is in different degree.[4] In the early case of *King v. Sturges*[5] the Court held that a tenant at will has such an interest in the land as will support a homestead exemption and that any interest in the land save that of a mere wrongful intruder or trespasser will support the exemption.[6] The Court in the present decision cited the early case as authority. In the present case the Court found that Bill was a mere lodger, had no interest in the land on which he actually resided, and that the land on which he resided was occupied as a homestead by another. The Court also applied the rule that the interest of the claimant while so occupying the land must be such as to entitle him to the exclusive possession thereof, except in cases of co-tenancy. The case indicates that a tenant at sufferance may have a sufficient interest.

Berry v. Dobson[7] has often been quoted by the Court as authority for the position that the claimant must have some *assignable interest* in the land.[8] In that case, a husband conveyed land, and continued with his wife to occupy it as a residence as a tenant at will. The Court, referring to the wife, said: "The appellant had no right as to the land derivative from her deceased husband, for he had no interest in the land which was transmissible. He was not the owner of any estate in it. He was but a mere tenant at will, and this tenancy terminated at his death. Homestead right is founded on ownership of some assignable interest in the land. It must be owned and occupied. It may be the lowest kind of estate, but it must be an interest in the land." Though the Court has not ruled upon the point, it has been uniformly held in other jurisdictions that a tenancy at will, being determinable at any time, cannot be assigned by the tenant to another and that an attempt by such a tenant to assign terminates his estate.[9] It seems, therefore, if the Court were to require that the claimant have an assignable interest that he would have to have a greater interest in the land than that of a tenant at will.

Both *King v. Sturges* and *Berry v. Dobson* have been quoted in recent decisions, both having been cited in the same case as authority for what interest the claimant

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[2]MISS. CODE ANN. (1942) § 317.

[3]Meyers v. American Oil Co., 192 Miss. 180, 5 So. (2d) 218 (1941); Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940); Patrick v. Bank of Tupelo, 169 Miss. 157, 152 So. 838 (1934); Chrismand v. Mauldin, 130 Miss. 259, 94 So. 1 (1922); Mounger v. Candy, 110 Miss. 133, 69 So. 817 (1915).

[4]King v. Sturges, 56 Miss. 606 (1879) (tenant at will and fee simple); Hinds v. Morgan, 75 Miss. 509, 23 So. 35 (1897) (tenant at will and fee simple).

[5]56 Miss. 606 (1879).

[6]The claim of homestead is sustainable in premises which are held and occupied by the claimant as equitable owner. Edmondson v. Meacham, 50 Miss. 34 (1874).

[7]68 Miss. 483, 10 So. 45 (1891).

[8]Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937); Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).

[9]BURBY, REAL PROPERTY (1943) 154; 32 AM. JUR. 294; Notes (1923) 23 A.L.R. 145, (1931) 70 A.L.R. 488.

must have in the land.[10] Neither case has been repudiated by the Court. *King v. Sturges* seems to furnish the better and more logical view and is in line with the weight of judicial authority. The prevailing view in other jurisdictions, in the absence of statute to the contrary, appears to be that the naked possession without any title whatever is sufficient to support the claim.[11] The idea behind such a view is that if a debtor's possessory right is of sufficient value to be coveted by the creditors, it is of sufficient value to the debtor to be protected under the homestead law.[12] The Court in the present case reaffirms the liberal view of the earlier case.

—*James C. Crigler*

Libel and Slander—Exceeding a Conditional or Qualified Privilege

Money was found underneath a placque near the cash register of defendant's store by one of the five clerks working there and the matter was reported to the assistant manager. During working hours of the following day, three of the department clerks, including the plaintiff, were addressed collectively by the assistant manager near the cash register in the department, at which time the assistant manager stated that one of the three had trifled with the money and that all three were fired with blots on their records. The plaintiff brought action for slander. At the trial, the assistant manager admitted that he thought the act was one involving carelessness; evidence was introduced to show that the assistant manager spoke in a loud voice, that he was angry, and that there were customers present in the department at the time the statements were made. After defendant's motion for a directed verdict was refused in the lower court, the case was submitted to a jury who returned a verdict for the plaintiff. Held: The evidence warranted a finding by the jury that the conditional privilege, claimed by the defendant through his employer-employee relation with the plaintiff, had been exceeded. *Montgomery Ward and Co., Inc., et al. v. Skinner,* 25 So. (2d) 572 (Miss. 1946).*

Historically, in the law of libel and slander, a showing of malice on the part of the communicator was considered an essential element of the plaintiff's cause of action,[1] but the courts developed the fiction that the speaking of certain words raised a presumption of malice on the part of the speaker.[2] However, a person who publishes words which would otherwise be defamatory may be excused from liability because of a privilege. There are two types of privilege—absolute and qualified or conditional. If an absolute privilege[3] is shown, it is generally held that the com-

[10]Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937); Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).

[11]26 Am. Jur. 36; Note (1934) 89 A.L.R. 518.

[12]Note (1934) 89 A.L.R. 518.

*The problem as to liability of the defendant for a defamatory statement made in the alternative to one of three persons is not included within the scope of this comment.

[1]Bromage v. Prosser, 4 B. & C. 247, 1 C. & P. 475 (1825); White v. Nicholls, 3 How. 266, 11 L.Ed. 591 (U.S. 1845).

[2]See Miss. Code Ann. (1942) § 1059 and annotations thereunder for definition of actionable words in Mississippi. Certain words may be actionable per se in which cases malice is presumed as a matter of law from their utterance. Furr v. Speed, 74 Miss. 423, 21 So. 563 (1896). Accusing one of being a thief is actionable per se. Valley Dry Goods Co. v. Buford, 114 Miss. 414, 75 So. 252 (1917).

[3]"An absolutely privileged communication is one in respect of which, by reason of the occasion on which, or the matter in reference to which, it is made, no remedy can be had in a civil action, however hard it may bear upon a person who claims to be injured thereby." 33 Am. Jur. 123.

municator may not be liable for the words spoken whether maliciously or not.[4] But if a conditional or qualified privilege is relied on by the speaker, such privilege may be exceeded or abused so that its protection may be lost.[5]

A qualifiedly or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation.[6] Communications have been held qualifiedly privileged when made in good faith to proper parties relative to family matters by intimate friends,[7] by a union officer concerning the activities of a member of the union,[8] by a store manager to a customer,[9] by a mortgagor to a mortgagee,[10] by a store manager to an employee,[11] or by one stockholder of a corporation to another made in the usual course of business.[12] As a matter of public policy such communications are not within the rules imposing liability for defamation.[13]

In discussing the problems concerning qualified privilege, a clear understanding of the distinction between the terms *occasion of privilege* and *privileged communication* is necessary. An occasion of privilege arises where the evidence establishes circumstances which the law says support a duty to make a statement of facts honestly believed to be true.[14] A privileged communication is a statement made in good faith with an honest intent to perform a duty, on an occasion of privilege.[15] Thus, it is possible that a statement made on an occasion of privilege may not be a privileged communication.

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[4]Andrews v. Gardiner, 224 N.Y. 440, 121 N.E. 341, 2 A.L.R. 1371 (1914).

[5]Montgomery Ward and Co. v. Watson, 55 F. (2d) 184 (C.C.A. 4th, 1932); Kenney v. Gurley, 208 Ala. 523, 95 So. 34, 26 A.L.R. 813 (1923).

[6]Grantham v. Wilkes, 135 Miss. 777, 100 So. 673 (1924); Louisville Times Co. v. Lyttle, 257 Ky. 132, 77 S.W. (2d) 432 (1935).

[7]Buisson v. Huard, 106 La. 768, 31 So. 293, 56 L.R.A. 296 (1901).

[8]Bereman v. Power Publishing Co., 93 Colo. 581, 27 P. (2d) 749, 92 A.L.R. 1024 (1933).

[9]Dunlevy v. Wolverman, 196 Mo.App. 46, 79 S.W. 1165 (1904).

[10]Bavington v. Robinson, 124 Md. 85, 91 A. 777 (1914).

[11]Montgomery Ward v. Watson, 55 F. (2d) 184 (C.C.A. 4th, 1932); Walgreen Co. v. Cochran, 61 F. (2d) 357 (C.C.A. 8th, 1932).

[12]Kimball v. Post Pub. Co., 199 Mass. 248, 85 N.E. 103, 19 L.R.A. (N.S.) 862, 127 Am.St.Rep. 492 (1908).

[13]"There are certain occasions on which a man is entitled to state what he believes to be the truth about another, and in so doing, public policy requires that he shall be protected, provided he makes the statement honestly and not for any indirect or wrong motive." La. Oil Corp. v. Renno. 173 Miss. 609, 619, 157 So. 705, 708, 98 A.L.R. 1296, 1299 (1934).

[14]Atwater v. Morning News Co., 67 Conn. 504, 34 A. 865 (1896).

[15]*Ibid.*

It is well settled that express malice[16] on the part of the communicator will defeat the protection of a qualified privilege.[17] Likewise, good faith, or lack of malice, on the part of the communicator in making a statement is said to be necessary to make a communication qualifiedly privileged.[18] The question is then presented as to who must bear the burden of proof on the issue of malice or no malice. It is generally said that the one who relies on the defense of a conditional privilege must carry the burden of proof as to that issue.[19] Thus, some courts hold that good faith, an interest to be upheld, a statement limited in its scope to the purpose, a proper occasion, and publication in a proper manner to proper parties only, must be proved by the party relying on the privilege.[20] This seems to throw on the defendant the necessity for proving good faith or lack of malice before he is entitled to claim the defense of qualified privilege. But the majority of the cases state that it is encumbent on the defendant to establish an occasion of privilege, after which it will be presumed that the communication was made in good faith without malice; this puts upon the plaintiff the burden of showing that the communication was made maliciously in order to defeat the privilege.[21] The latter rule was followed by the early common law.[22]

As to the relative functions of the court and of the jury in cases involving qualified privilege, it is said generally that whether or not the defendant has established an occasion of privilege is a question of law for the court when the facts are undisputed.[23] Likewise, many courts hold that the question as to whether or not the communication was qualifiedly privileged is for the court to decide where the facts are settled.[24] But when the facts supporting an alleged privileged communication are disputed, the rule generally is that such facts must be determined by the jury.[25]

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[16]Malice in fact or express malice has been defined as the malice of the evil motive, malus animus, implying desire and intention to injure, or indicating that the party was actuated either by spite or ill will toward an individual or by improper motives, or by a wanton and reckless disregard of the rights of others. 36 C.J. 1147. It is generally stated that express or actual malice as distinguished from legal or implied malice is necessary to defeat a qualified privilege. Montgomery Ward and Co. v. Watson, 55 F. (2d) 184 (C.C.A. 4th, 1932). Implied or legal malice has been said to denote absence of lawful excuse, not imputing motives of ill will with intent to injure. Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911).

[17]Montgomery Ward and Co. v. Watson, 55 F. (2d) 184 (C.C.A. 4th, 1932).

[18]Christopher v. Akin, 214 Mass. 332, 101 N.E. 971, 46 L.R.A. (N.S.) 104 (1913); Switzer v. American R. Exp. Co., 119 S.C. 237, 112 S.E. 110, 26 A.L.R. 819 (1922).

[19]Sheftall v. Central of Georgia, 123 Ga. 593, 51 S.E. 648 (1905); Switzer v. American R. Exp. Co., 119 S.C. 237, 112 S.E. 110, 26 A.L.R. 819 (1922).

[20]*Ibid.*

[21]Kroger Grocery and Baking Co. v. Yount, 66 F. (2d) 700, 92 A.L.R. 1166 (C.C.A. 8th, 1933); Chaffin v. Lynch, 84 Va. 884, 6 S.E. 474 (1888).

[22]Wright v. Woodgate, 2 Cromp. M. & R. 573, 150 Eng.Rep.R. 244 (1835); Toogood v. Sprying, 1 Cromp. M. & R. 181 (1834).

[23]Atwater v Morning News Co., 67 Conn. 504, 34 A. 865 (1896); Doyle v. Clauss, 190 App.Div. 838, 180 N.Y.Supp. 671 (1920).

[24]Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907); Warner v. Missouri P. R. Co., 112 F. 114 (C.C.W.D.Tenn. 1901).

[25]Bavington v. Robinson, 124 Md. 85, 91 A. 777 (1914); Howland v. Blake Mfg. Co., 156 Mass. 543, 31 N.E. 656 (1892). Though there are some courts which state that when the facts are disputed, the question of whether or not there is a conditionally privileged communication is for the jury, from an interpretation of the language used in such cases it seems probable that the courts mean to say that the facts on which the conditional privilege rests are for the jury, and that the court is to determine the question of conditional privilege in its instructions. See Davis v. Wells, 25 Tex.Civ.App. 155, 60 S.W. 566 (1901).

The term "excess of privilege" is used in two senses, as applied to conditionally privileged communications, and denotes a manner in which a conditional privilege may be defeated. In one sense, the term may be used by the court in holding that a communication is not within a conditional privilege as a matter of law. Thus, when it is clear that a communication did not relate to the subject, but was of an extraneous and impertinent nature, the court may rule that the conditional privilege is exceeded, though the circumstances may have been such that a proper communication would have been within the privilege.[26] At other times, the language used on a privileged occasion may be considered so strong or abusive as to be outside the conditional privilege as a matter of law,[27] or a communication may be held to exceed the conditional privilege by the court when given undue publicity.[28] In such cases when the court rules an excess of privilege as a matter of law, it is often stated that the defense of conditional privilege fails whether there is a showing of express malice on the part of the communicator or not.[29]

However, the term "excess of privilege" is often used in a second sense as denoting express malice on the part of the communicator which will defeat the conditional privilege.[30] When used in this manner, the question as to whether or not the conditional privilege is exceeded is, by the great weight of authority, a question for the triers of fact.[31] The malice necessary to defeat a qualified privilege may be proved through the circumstances surrounding the communication and from the communication itself.[32] Excess of statement is said to be evidence of express malice,[33] as well as the use of language of a defamatory nature not warranted by the occasion,[34] and in a number of cases, the courts have held that a manner of publication which gives unnecessary publicity to a statement is evidence of malice.[35] On other occasions, the fact that a statement was made when the speaker did not believe in its truth,[36] or when the speaker did not have probable cause to believe in its truth[37] has been considered as evidence of actual malice.

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[26]Andrews v. Gardiner, 165 App.Div. 595, 150 N.Y.Supp. 891 (1914). "The privilege does not extend to a communication upon any extraneous matter which the defendant may make at the same time. The communication on the extraneous matter is not made upon a privileged occasion at all, since the existence of privilege on one matter gives no protection to irrelevant libel introduced into the same communication." 33 AM. JUR. 176.

[27]Hodges v. Cunningham, 160 Miss. 576, 135 So. 215 (1931); Hoey v. New York Times Co., 138 App.Div. 149, 122 N.Y.Supp. 978 (1910).

[28]Brow v. Hathaway, 13 Allen 239 (Mass. 1866).

[29]Rosenberg v. Mason, 157 Va. 215, 160 S.E. 190 (1931).

[30]Kenney v. Gurley, 208 Ala. 523, 95 So. 34, 26 A.L.R. 813 (1923); Fullerton v. Thompson, 123 Minn. 136, 143 N.W. 260 (1913).

[31]*Ibid.*

[32]Kenney v. Gurley, 208 Ala. 523, 95 So. 34, 26 A.L.R. 813 (1923).

[33]If the publication goes beyond the occasion or more is written than the facts justify, such excess of statements is said to be considered as evidence of express malice. Hill v. Durham House Drainage Co., 79 Hun 335, 29 N.Y.Supp. 427 (1894).

[34]Bereman v. Power Publishing Co., 93 Colo. 581, 27 P. (2d) 749, 92 A.L.R. 1024 (1933).

[35]Bereman v. Power Publishing Co., 93 Colo. 581, 27 P. (2d) 749, 92 A.L.R. 1024 (1933); Kenney v. Gurley, 208 Ala. 523, 95 So. 34, 26 A.L.R. 813 (1923); Kroger Grocery and Baking Co. v. Yount, 66 F. (2d) 700, 92 A.L.R. 1166 (C.C.A. 8th, 1933).

[36]Hollenbeck v. Ristine, 105 Iowa 488, 67 Am.St.Rep. 306 (1898).

[37]*Ibid.*

The reported case does not give the instructions submitted to the jury in the lower court but from an examination of the language used, one such instruction must have been that if the jury found that the assistant manager had acted in willful and wanton disregard of the rights of the plaintiff and in excess of any rights which he had in investigating the misplaced money, then the conditional privilege was exceeded. Such an instruction would be the equivalent of saying that a willful or wanton act in disregard of another's rights amounts to express malice or malice in fact sufficient to defeat a conditional privilege; certainly there was sufficient evidence introduced at the trial to warrant a finding by the jury of such reckless conduct on the part of the assistant manager. This definition of express malice conforms to the meaning of the term as expressed in a number of cases,[38] but on other occasions, the courts have stated that express malice denotes a hatred or ill will and an intention to do injury on the part of the speaker, without which a conditional privilege will not be exceeded.[39] Both of the foregoing definitions of express malice have been used by the Mississippi Supreme Court in previous cases involving conditionally privileged communications.[40] If the latter definition of express malice had been followed in this case, it seems doubtful that there was sufficient evidence of such express malice adduced at the trial to submit the question to the jury. However, the court might well have been justified in ruling an excess of privilege as a matter of law, for which no showing of express malice would have been necessary, considering the fact that the statements were made by the assistant manager without belief in their truth.

—Charles C. Jacobs, Jr.

Master and Servant—Respondeat Superior—Should Age of Minor Servant Be Considered in Determining Liability of Master for Acts of Servant?

Plaintiff sues for injuries received from truck driven by an eighteen year old agent of defendant. The trial court refused to instruct the jury to consider the age of the minor agent in determining if liability should be imposed on defendant. Held: Instruction correctly refused. Consideration of a minor's immaturity is for his protection alone and should not operate to put his employer in a more advantageous position than one who employs adults. *Hill Transportation Co. v. Everett,* 145 F. (2d) 746 (C.C.A. 1st, 1944).

The vicarious liability of a master for the wrongful acts of his servant committed while acting in the scope of his employment is an exception to the principle that one shall not be held liable for an injury to another without personal fault.

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[38]Bradstreet Co. v. Gill, 72 Tex. 115, 9 S.W. 753, 2 L.R.A. 405, 13 Am.St.Rep. 768 (1888); Deckelman v. Lake, 149 Md. 533, 131 A. 762 (1926).

[39]Peterson v. Cleaver, 105 Neb. 438, 181 N.W. 187, 15 A.L.R. 447 (1920); Montgomery Ward and Co. v. Watson, 55 F. (2d) 184 (C.C.A 4th, 1932)

[40]"Malice in fact relates to the state or condition of the mind of a person who speaks defamatory words. It includes an intention to injure, hatred, or ill will, but is not limited thereto, and appears if words of the character here under consideration were spoken wantonly and in disregard of a civil obligation, i.e., if they were spoken recklessly without knowing or caring whether they were true." Kroger Grocery and Baking Co. v. Harpole, 175 Miss. 227, 238, 166 So. 335, 339 (1936). "Actual or express malice, as distinguished from malice in law, in its ordinary sense denotes ill will, a sentiment of hate or spite, especially when harbored by one person toward another, and exists when one with a sedate, deliberate mind and formed design injures another, as where the person is actuated, by ill will in what he does and says, with a design to willfully or wantonly injure another." Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 503, 177 So. 766, 770 (1938).

Many reasons have been given for the existance of this exception. Most of the earlier theories such as the implied command, the alter ego, and the "ratification by the master of the servant's acts" theories strove to show a physical relation between the acts of the servant and the master.[1] In recent years the tendency has been to base this vicarious liability on the theory that the master, having in the great majority of cases numerous business transactions with the public, may better distribute the risk by passing the loss on to the public in small doses.[2]

It is usually stated that if the servant commits no tort the master is not liable to an injured third party.[3] Since the instruction asked for in the principal case was not given, the master may be held liable to the injured third party even though his servant has committed no tort. The action of the court in refusing to give the instruction technically is contrary to dictum in many decisions, that if the servant be exonerated from liability the master must also be exonerated.[4] Further, the effect of the action of the court in instant case is that the master may be held liable and yet not have the usual action over against the servant because the latter has not committed a tort.[5]

The only authority directly in point with the principal case reaches a result contra to the dictum in the cases stating that exoneration of the servant necessarily exonerates the master. The Supreme Court of Kentucky held in *Davis' Adm'r v. Ohio Valley Banking and Trust Co.* that a master would be liable for the acts of his minor servant as though the servant were a competent adult.[6]

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[1]These theories are discussed at length in 6 LABATT, MASTER AND SERVANT (2d ed. 1913) 6717 *et seq.*

[2]"If that employer is compelled to bear the burden of his servant's torts even when he is himself personally without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained." Laski, *The Basis of Vicarious Liability* (1916) 26 YALE L. J. 105 at 112.

[3]Johnson v. City of San Fernando, 35 Cal.App. (2d) 244, 95 P. (2d) 147 (1939); Glass v. Hutchinson Ice Cream Co., 214 Iowa 825, 243 N.W. 352 (1932); Pangburn v. Buick Motor Co., 211 N.Y. 288, 105 N.E. 423 (1914); Dare v. Boss, 111 Ore. 190, 224 P. 646 (1924); Madeiros v. American Bottling Corp., 129 A. 731 (R.I. 1925).

[4]These cases, cited *supra* note 3, were cases in which only one standard of care was owed to the public by both the master and the servant. In the principal case, however, the servant owed one degree of care to the public, that of a minor, while the master owed that care of an adult. This distinction is noted in 9 BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE (Perm. ed. 1935) 178, citing Maldonato v. Ironbound Transportation Co., 9 N.J.Misc. 985, 156 A. 275 (1931) in which the servant of a carrier was held to owe to a passenger an ordinary degree of care while the master owed a high degree of care to him. In the New Jersey case the servant was exonerated but the master held liable.

[5]The position that the master should not be held liable to a third party if he cannot recover over against his servant does not seem tenable under any of the theories of vicarious liability. The distribution of the risk theory contemplates that the master will stand the loss but justifies this fact, and the alter ego and implied command theories recognize a separate duty owing to third persons by the master which duty the master violates through the act of his servant and thus commits a tort in his own right.

[6]Master employed a boy to run an elevator, and this minor servant injured another boy. Court in holding master liable said, "an employer must be held to the same degree of care as if the person in charge had been a careful and experienced man." Davis' Adm'r v. Ohio Valley Banking & Trust Co., 127 Ky. 800, 106 S.W. 843, 15 L.R.A. (N.S.) 402 (1908).

The principal case reaches a result which is in conformity with the justification usually advanced for imposing vicarious liability on a master. The interest of the public is protected by forcing an employer to be careful in selecting and ever vigilant in supervising his employee.[7] Moreover, the master who hires a minor servant is in a much better position to distribute the loss among the public than will be third parties who may be injured by the servant's acts. If a master wishes to hire minor servants, he should be encouraged to protect the public from his servant's acts by carrying insurance. If such insurance results in a higher cost of the master's services to the public, at least the loss will be spread over a large number of people and will not be borne by one innocent person, the victim of the servant's act.[8]

—*Robert N. McNutt*

Partnership—Distribution of Assets on Dissolution—Distinction Between Capital and Undivided Profits

X, *Y*, and *Z*, physicians, agreed in writing to form a partnership for a stipulated period. *Y* and *Z* contributed to the firm, accounts receivable of an aggregate face value almost seventeen times greater than those contributed by *X*. The amount which *X* was to withdraw from the firm each month during its existence (this amount termed "compensation" by the agreement) was one-sixth of the first $3000 net monthly collections; one-fourth of the next $1000; and an equal share with *Y* and *Z* of all net monthly collections over $4000. The agreement was silent as to disposition of firm assets on dissolution. Prior to the expiration of the stipulated term, *X* died. *Y*, liquidating partner, collected accounts, and paid *X's* wife one-sixth of such total collections. *X's* wife brought an action to recover one-third of the total collections. Held: The apparent intention of the parties, as determined by the contract of partnership, supplemented by the acts of the parties, is that the interest of *X* in firm assets (here composed of accounts receivable) is to be determined by his monthly "compensation" received during the operation of the business. *Sanderson v. Parsons*, 195 Miss. 875, 15 So. (2d) 513 (1943), *sug. error overr.*, 195 Miss. 875, 892, 16 So. (2d) 774 (1944).

The *assets* of a partnership usually mean the property originally contributed, or which has been subsequently acquired on account of the firm.[1] *Capital* is the aggregate of the sums which the partners contribute for the transaction of partnership business.[2] *Undivided profits* refer to undistributed earnings.[3] Ordinarily, the *net assets* of a partnership on dissolution are composed of both *capital* and *undivided profits*.

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[7]See 6 Labatt, Master and Servant (2d ed. 1913) 6782.

[8]The Mississippi Court has apparently adopted the alter ego theory as the basis of vicarious liability. "He who acts through another is himself the actor." Slaughter v. Holsomback, 166 Miss. 643, 659, 147 So. 318, 322 (1933). This theory might be called the "shadow" theory of vicarious liability. As the servant acts within the scope of his employment, the master constructively performs the same act as though he were the servant's shadow. Under this theory there is no difficulty in holding the employer to an adult standard of care since he is constructively doing the act at the same time the servant is acting and should, consequently, be held to an adult standard of care when considering his constructive acts.

[1]McMahon v. Brown, 219 Mass. 23, 106 N.E. 576 (1914).

[2]Meecham, Elements of the Law of Partnership (2d ed. 1920) § 133.

[3]Edwards v. Douglass, 269 U.S. 85, 46 S.Ct. 85, 70 L.Ed. 235 (1925).

In the absence of a stipulation to the contrary in the articles of partnership, capital is regarded as a debt which the firm owes the individual partners.[4] After firm creditors have been paid, but before there is a division of profits, each partner is entitled to the amount of capital he has contributed; this amount to be repaid in full if the firm assets are sufficient.[5] On the other hand, profits will be distributed equally among the partners in the absence of a specific stipulation for an unequal division, or of circumstances or other evidence from which such an intent may be inferred.[6] In most jurisdictions, profits are equally divided even though the respective contributions of capital by individual partners are unequal.[7] A presumption arises in favor of equality of distribution of profits, which may be rebutted only by clearly competent evidence of an agreement to the contrary. This presumption does not arise when the question is one of division of partnership capital.[8]

Counsel and the Court, in the instant case, did not clearly distinguish between capital and undivided profits in determining what *X's* wife was entitled to receive. Counsel refer to "proceeds" and "profits" of the firm. The Court speaks of firm "assets" on dissolution, and monthly "compensation" of the parties.

A more logical result would have obtained if the initial contributions of accounts receivable had been considered firm capital. Under the majority rule, each partner should be repaid his contribution from firm assets. The residue, after payment of firm debts and repayment of capital contributions, would be undivided profits. The presumption is that the partners would share equally in this residue.[9] The assets of

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[4]Adams v. Hubbard, 221 Pa. 511, 70 A. 835 (1908); Chapin v. Long, 205 Mo.App. 414, 224 S.W. 1012 (1920). "The partnership as an entity distinct from its individual members, becomes indebted to them for the capital they advance, and upon a settlement this debt should be paid just as any other liability of the firm." Buie v. Kennedy, 164 N.C. 290, 80 S.E. 445, 446 (1913).

[5]*In re* Hall, 32 R.I. 424, 79 A. 966 (1911); Lavoine v. Casey, 251 Mass. 124, 146 N.E. 241 (1925); Willbanks v. Rogers, 228 S.W. 265 (Tex. 1921). See also cases cited *supra* note 4. *Contra:* Johnson v. Ballard, 83 Tex. 486, 18 S.W. 686 (1892), wherein it is stated: ". . . when there is no evidence, either direct or circumstantial, as to their [the partners] respective shares in the capital stock, the presumption is also that they hold an equal interest."

[6]Frazer v. Linton, 183 Pa. 186, 38 A. 589 (1897); Kelly v. Bank, 62 P. (2d) 1359 (Wash. 1936); Randle v. Richardson, 53 Miss. 176 (1876); Smiley v. Smiley, 112 Va. 490, 71 S.E. 532 (1911); Wischmeyer v. Siebeneck, 46 Ohio App. 486, 189 N.E. 509 (1933).

[7]"In the absence of an agreement or evidence as to the proportions of profit or loss to be divided between the parties, the presumption is in favor of the equality of the shares. It makes no difference that one partner contributes all the capital and the other only services or skill, for the court cannot set a proportionate value upon these respective contributions." Lester v. Adams, 215 Mo.App. 606, 257 S.W. 142, 145 (1923). *Accord:* Dovey v. Dovey, 95 Nebr. 624, 146 N.W. 923 (1914); Paul v. Cullum, 132 U.S. 539, 10 S.Ct. 151, 33 L.Ed. 430 (1889); Underwood v. Overstreet, 188 Ky. 562, 223 S.W. 152, 10 A.L.R. 1352 (1920).

[8]"The law of partnership is well settled that, where the question is one of the division of profits, the presumption is that the profits are to be divided equally. Furthermore, such equality will be presumed, notwithstanding the fact that the contributions to the firm capital are not equal. . . . However, when the question is one of the division of the partnership capital, the same presumption does not arise. . . . Unequal contribution is sufficient to contradict the idea of equal division of capital." Johnson v. Jackson, 130 Ky. 751, 114 S.W. 260, 262 (1908).

[9]In the principal case, the contract is silent as to the interest of the partners in assets on dissolution; and, in the language of a member of the Court, "there was no evidence offered, competent or otherwise, as to any agreement in that behalf." 195 Miss. 875, 894, 16 So. (2d) 774, 775 (1944).

the firm could have been distributed according to these principles with a facility at least equal to that experienced by the Court in reaching its conclusion.

The Court undoubtedly was attempting to give full effect to the unexpressed intention of the parties. However, if the Court intends to lay down the rule that the interest of each partner in firm assets on dissolution is to be determined by monthly "compensation" received by each respectively during the existence of the partnership, the words of the dissenting Justice that such a rule "would be unsafe, and I fear would disturb settled legal principles" are both profound and prophetic.

—*Reginald A. Gray, Jr.*

Taxation—Piercing the Corporate Entity

Partners conducting real estate business transferred partnership's income-producing property to two corporations. Both corporations realized profits. The Tax Court determined that these profits should be subjected to the corporate income tax rate. This is a proceeding by the partners to reverse that determination. The partners claim that the corporations were mere dummies and should be disregarded for income tax purposes. Held: The corporate identity of one corporation is to be disregarded for taxation purposes. It is a passive dummy which serves no independent business function. The profits of the other corporation are subject to the corporate tax rate. It borrowed money and performed other significant business acts. *Paymer v. Commissioner of Internal Revenue,* 150 F. (2d) 334 (C.C.A. 2d, 1945).

Courts generally look through the corporate existence when necessary to avoid inequitable results.[1] Thus, corporate entities have been pierced to prevent fraud on creditors;[2] to prevent the avoidance of contractural obligations;[3] to prevent escape from accountability for criminal acts.[4] Likewise, the corporate existence of a subsidiary is disregarded when it is being used as a mere front or agency for the parent corporation.[5]

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[1]Wenban Estate v. Hewlett, 193 Cal. 675, 227 P. 723 (1924).

[2]*In re* Berkowitz, 173 F. 1013 (D.N.J. 1908) (conveyance from debtor to a corporation fraudulently formed to receive debtor's assets, ignored, and creditor allowed to seize assets in hands of corporation); Kellogg v. Douglas County Bank, 58 Kan. 43, 48 P. 587, 62 Am.St.Rep. 596 (1897); Booth v. Bunce, 33 N.Y. 139, 88 Am.Dec. 372 (1865).

[3]Kramer v. Old, 119 N.C. 1, 25 S.E. 813, 34 L.R.A. 389 (1896) (Corporation composed of individuals doing business which individuals had contracted not to engage in, is a breach of contract by the individuals, and court will treat the attempt to incorporate as though the individual promisors had re-engaged in the business and will enjoin the individuals from taking part in the newly formed corporation); A. Booth & Co. v. Seibold, 74 N.Y.Supp. 776 (1902).

[4]Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co., 149 F. (2d) 359 (C.C.A. 5th, 1945) (one who sets fire to corporate property, and who is practically sole stockholder of the corporation can be treated as the corporation by insurance company suing in tort for the criminal act—the corporate entity being pierced); D. I. Felsenthal Co. v. Northern Assur. Co., 284 Ill. 343, 120 N.E. 268, 1 A.L.R. 602 (1918); Southern Electric Securities Co. v. State, 91 Miss. 195, 44 So. 785, 124 Am.St.Rep. 638 (1907); McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S.W. 38, 4 Am.St.Rep. 771 (1887).

[5]Barr & Creelman Mill & Plumbing Supply Co. v. Zoller, 109 F. (2d) 924 (C.C.A. 2d, 1940); Day v. Postal Telegraph Co. of Baltimore City, 66 Md. 354, 7 A. 608 (1887) (assets of auxiliary executed upon to pay creditors of parent); Buie v. Chicago, R.I. & P. Ry. Co., 95 Tex. 51, 65 S.W. 27 (1901).

Piercing of corporate entities has occurred more recently in the field of income taxation.[6] Disregard of the corporate entity in such instances has been limited to situations where the corporate device serves no purpose, but where the corporation is so closely connected with the individual business of its stockholders or with a parent corporation that the functions of the two reasonably can be said to be merged.[7] On the other hand, courts recognize the corporate entity if the corporation performs significant business acts.[8]

Although a corporation is performing, or has performed, significant business acts, a particular transaction of the corporation can be disregarded to avoid inequitable results. The test here is whether the taxpayer is receiving an undue benefit.[9]

Isolated decisions tend to recognize or not to recognize the corporate entity as best benefits the Treasury Department.[10] Courts have been especially reluctant to look through the corporate entity when to do so would reduce the amount of taxes collectible.[11] If this tendency continues, it is suggested that Congress should clarify under what circumstances a corporation is to be given a separate existence in taxation cases.

—*Robert P. Roberts, Jr.*

Wills—Statute of Frauds—Oral Agreements for the Devise of Realty

A paralytic, who required constant attention, made an oral agreement with complainant that he would leave her all of his property, in return for her care during his lifetime. A will was executed in accordance with this agreement, but not men-

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[6]Gregory v. Helvering, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355 (1935); Southern Pacific Co. v. Lowe, 247 U.S. 330, 38 S.Ct. 540, 62 L.Ed. 1142 (1918); United States v. Rodgers, 94 F. (2d) 666 (C.C.A. 3d, 1938).

[7]Gregory v. Helvering, Southern Pacific Co. v. Lowe, United States v. Rodgers (by implication), all *supra* note 6.

[8]Commissioner of Internal Revenue v. Montgomery, 144 F. (2d) 313 (C.C.A. 5th, 1944) (contractor personally bound himself to construct buildings, and before he had completed his work, formed a corporation and assigned his contract to the new corporation; court permitted the income to be split between the contractor's personally earned income, and the corporation's earned income, thereby reducing the surtax on the individual contractor's income tax by excluding therefrom the amount earned separately by the corporation; assignee was held to be doing business as a bona fide corporation); National Investors Corp. v. Hoey, 52 Fed.Supp. 556 (S.D.N.Y. 1943).

[9]Minnesota Tea Co. v. Helvering, 302 U.S. 609, 58 S.Ct. 393, 82 L.Ed. 474 (1938); S. A. Macqueen Co. v. Commissioner of Internal Revenue, 67 F. (2d) 857 (C.C.A. 3d, 1933) (corporation's conveyance of assets to its president may be disregarded where such assets are later sold by president and profits distributed among the stockholders; transaction will be same as if corporation itself sold the land, therefore subjecting profit to a higher corporate tax rate).

[10]Prudence Securities Corporation v. Commissioner of Internal Revenue, 135 F. (2d) 340 (C.C.A. 2d, 1943) ("While there are perhaps conceivable circumstances in which accruing interest on bonds of a wholly owned subsidiary held by its parent company might be deductible from the subsidiary's gross income, certainly when the government chooses to assail the transaction such a deduction cannot be permitted.")

[11]Burnet v. Commonwealth Improvement Co., 287 U.S. 415, 53 S.Ct. 198, 77 L.Ed. 399 (1932); Watson v. Commissioner of Internal Revenue, 124 F. (2d) 437 (C.C.A. 2d, 1942); Redman v. Mealey, 58 N.Y.S. (2d) 735 (1945); *cf.* Southern Pacific Co. v. Lowe, 247 U.S. 330, 38 S.Ct. 540, 62 L.Ed. 1142 (1918), cited *supra* note 6; see Finkelstein, *The Corporate Entity and the Income Tax* (1935) 44 Yale L. J. 436, 440.

tioning it, and was later revoked in favor of defendant. Complainant fully performed her contract by caring for testator until his death, as she had no knowledge of this revocation. She now files a claim for reinstatement of the original will. HELD: Such an agreement did not constitute an "oral agreement to convey land" within the Statute of Frauds,[1] and the revocation of the will was such a fraud on complainant that equity will hold the will to be irrevocable. *Johnston v. Tomme,* 24 So. (2d) 730 (Miss. 1946).

The Statute of Frauds has always been strictly construed in Mississippi, and the Court has repeatedly held that no exception would be engrafted upon it.[2] It is without contradiction that oral contracts for the devise of land are within the Statute.[3] Also a firm rule has been established that the "memorandum" must include all material features so that parol testimony is not necessary to prove the contract.[4] Mississippi has been one of the few states to adhere to the doctrine that part performance of an oral contract to convey land is not sufficient to take such contract out of the operation of the Statute of Frauds.[5]

However, in the instant case there was a different set of facts than ever before presented. The services complainant performed were distinctly traceable to the contract. She performed her part of the agreement solely because the promisor executed the will in her favor. After her reliance on this, the revocation was clearly a fraud, and the Mississippi Court has held that the Statute may not be used as an engine of fraud.[6] Also the fact that the will was executed had considerable bearing on the Court's holding. There is dictum in other cases to the effect that a parol devise of realty will not be upheld because the will was never executed.[7] There is some authority for holding that a will executed pursuant to an oral contract is ir-

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[1]MISS. CODE ANN. (1942) § 264(d): "An action shall not be brought whereby to charge a defendant or other party . . . upon any contract for the sale of lands, tenements or hereditaments, or the making of any leases for a longer term than one year; . . . unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized in writing."

[2]Tanner v. Walsh, 184 Miss. 147, 183 So. 278 (1938); Hairston v. Jaudon, 42 Miss. 380 (1869); Catlett v. Bacon, 33 Miss. 269 (1857); Gothard v. Flynn, 25 Miss. 58 (1852).

[3]49 AM. JUR. 539; Wells v. Brooks, 24 So. (2d) 533 (Miss. 1946); Stephens v. Duckworth, 188 Miss. 626, 196 So. 219 (1940); Ellis v. Berry, 145 Miss. 652, 110 So. 211 (1926); Palmer v. Spencer, 161 Miss. 561, 137 So. 491 (1931); Campbell v. Bright, 87 Miss. 443, 40 So. 3 (1906).

[4]Paine v. Mikell, 187 Miss. 125, 192 So. 15 (1939); Taylor v. Sayle, 163 Miss. 822, 142 So. 3 (1932); Kervin v. Biglane, 144 Miss. 666, 110 So. 232 (1926); Nickerson v. Fithian Land Co., 118 Miss. 722, 80 So. 1 (1918); Gulfport C. O., F. & Mfg. Co. v. Renau, 94 Miss. 904, 48 So. 292 (1909); Waul v. Kirkman, 27 Miss. 823 (1854).

[5]Wells v. Brooks, 24 So. (2d) 533 (Miss. 1946); Milam v. Paxton, 160 Miss. 562, 134 So. 171 (1931); Howie v. Swaggard, 142 Miss. 409, 107 So. 556 (1926); Fisher v. Kuhn, 54 Miss. 480 (1877); Box v. Stanford, 21 Miss. 93 (1849).

[6]Lewis v. Williams, 186 Miss. 701, 191 So. 479 (1930); Dickson v. Green, 24 Miss. 612 (1852). The cases of Horne v. Higgins, 76 Miss. 813, 25 So. 489 (1899) and Ragsdale v. Ragsdale, 68 Miss. 92, 8 So. 315, 11 L.R.A. 316, 24 Am.St.Rep. 256 (1890), although involving trust questions, hold that the Statute cannot be set up as a shield to fraud.

[7]Wells v. Brooks, 24 So. (2d) 533 (Miss. 1946); Stephens v. Duckworth, 188 Miss. 626, 196 So. 219 (1940); Price v. Craig, 164 Miss. 42, 143 So. 694 (1932), where will was executed; Ellis v. Berry, 145 Miss. 652, 110 So. 211 (1926).

revocable.[8] The reasoning in these decisions alone did not influence the Court's holding, as there was no mention of the agreement in the will, and therefore no satisfaction of the rule that the writing must contain all of the essentials of the contract. However, the executed will coupled with the fraud formed a mandate for equity to enforce specific performance.

The Mississippi rule in the past has been that the promisee could not enforce the oral agreement, but must resort to an action based on quantum meruit for the services rendered.[9] In these cases, however, there was no element of fraud being perpetrated to the extent of an executed instrument and a reliance thereon. Other courts of this country have frequently granted specific performance in cases of this nature, but their holdings were based partly on the doctrine of part performance,[10] which Mississippi does not recognize.[11] However, it is plain from the language in the case that although performance on the part of the complainant was necessary in order for her to obtain relief, it was by no means the deciding factor.

It is an interesting question whether the Court allowed relief on the basis of contract, will or constructive trust imposed by the operation of law. The Court expressly disavows allowing relief on the contract,[12] and the other jurisdictions which allow relief in the nature of specific performance hold that such relief is granted out of the equities of the situation arising from the conduct of the parties and not on the contract itself.[13] As to a constructive trust it is well to consider the case of *Anding v. Davis*[14] which was quoted and approved in the instant case. There an oral promise to reconvey land after payment of a debt was specifically enforced by raising a trust in favor of the grantor's heirs, but this case arose before

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[8]Whitney v. Hay, 181 U.S. 77, 21 S.Ct. 537, 45 L.Ed. 758 (1901); Andrews v. Aiken, 44 Idaho 797, 260 P. 423, 69 A.L.R. 8 (1927); Nelson v. Schoonover, 89 Kans. 388, 131 P. 147 (1913); Anding v. Davis, 38 Miss. 574, 77 Am.Dec. 658 (1860); Torgerson v. Hague, 34 N.D. 646, 159 N.W. 6, 3 A.L.R. 164 (1916); Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1899). In the *Anding* case, the grantee, after making a will according to an oral agreement to reconvey land, destroyed it, and the Court, in sustaining specific performance, said: "Upon that consideration, in part, and for that purpose, he had received the deed, and the agreement had the force of a contract; and the will, when executed, was, as to this property, irrevocable." *Contra:* Hinton v. Hinton, 239 Ky. 664, 40 S.W. (2d) 296 (1931); Holsz v. Stephen, 362 Ill. 527, 200 N.E. 601, 106 A.L.R. 737 (1936), in which there were facts identical with those in the instant case, and the Court refused to decree specific performance, partly on the ground that the first will did not mention the agreement, and partly because they held that complainant had an adequate remedy at law.

[9]Wells v. Brooks, 24 So. (2d) 533 (Miss. 1946); Stephens v. Duckworth, 188 Miss. 626, 196 So. 219 (1940); Hickman v. Slough, 187 Miss. 525, 193 So. 443 (1940); First National Bank v. Owen, 177 Miss. 339, 171 So. 4 (1930); Ellis v. Berry, 145 Miss. 652, 110 So. 211 (1926).

[10]See cases cited 69 A.L.R. 110, where the rule is given that the part performance necessary to take the case out of the operation of the statute must be personal services of such a nature that their value cannot be ascertained, and usually labor performed or money paid are not sufficient.

[11]See cases cited *supra* note 5.

[12]Johnston v. Tomme, 24 So. (2d) 730, 733 (Miss. 1946): "The agreement is not being enforced, but its execution recognized and upheld. The bill seeks not a specific performance of the oral contract for the testator had already complied therewith by a writing duly executed."

[13]Whitney v. Hay, 181 U.S. 77, 21 S.Ct. 537, 45 L.Ed. 758 (1901); 49 Am. Jur. 823.

[14]38 Miss. 574, 77 Am.Dec. 658 (1860).

the Mississippi Statute of Frauds relative to trusts appeared,[15] and therefore that portion of it would be inapplicable. The later Mississippi decisions on trusts have been to the effect that, in order to take an oral trust out of the operation of the Statute, active fraud must be perpetrated by the intended trustee,[16] which was not the case here. Also in the *Anding* case, the executed will was held to be irrevocable, as was done in this case. If the Court held that the first will was irrevocable, then the second one could not pass the legal title to the defendant, enabling him to become a trustee; so, therefore, this case hinged on the executed will and the irrevocability thereof.

The Court, no doubt, reached an equitable result and relaxed to some extent the stringent construction which it has heretofore placed on the Statute, but at the same time, it is difficult to reconcile this decision with previous ones based on the Statute. As stated, quantum meruit would compensate the complainant and follow the Mississippi rule.[17] But it is a tendency of some courts, who have allowed a more liberal construction, that a promisee whose services are of such a nature that their value cannot be reasonably ascertained, and who because of the promise has altered her life to a great degree, is entitled to specific performance.[18] The Mississippi Court seems to follow the latter authority and reaches a unique result in the light of earlier decisions, indicative perhaps of an increasing liberality on the part of the Court.

—Knox White

Wills—What Is the End of a Will?

Proceedings for probate of the last will and testament of deceased. The document in question was wholly written in the handwriting of the deceased. The caption to the document was in the following words: "Metta G. Baker writing this." Following the caption were the dispositive clauses. No signature, date or other writing appeared underneath the last dispositive paragraph. Held: Instrument in the handwriting of deceased, captioned with her name followed by words "writing this" but without signature was not admissible to probate because not "subscribed" within the statutory requirement.[1] *Baker v. Baker's Estate,* 24 So.(2d) 841 (Miss. 1946).

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[15]Miss. Code Ann. (1942) § 269: "Hereafter all declarations or creations of trusts or confidence of or in any land shall be made and manifested by writing, signed by the party who declares or creates such trust, or by his last will, in writing, or else they shall be utterly void; and every writing declaring or creating a trust shall be acknowledged or proved as other writings, and shall be lodged with the clerk of the chancery court of the proper county to be recorded, and shall only take effect from the time it is so lodged for record; but where any trust shall arise or result, by implication of law, out of a conveyance of land, such trust or confidence shall be of the like force and effect the same as it would have been if this statute had not been passed."

[16]Lewis v. Williams, 186 Miss. 701, 191 So. 479 (1930); Moore v. Crump, 84 Miss. 612, 37 So. 109 (1904); Horne v. Higgins, 76 Miss. 813, 25 So. 489 (1899).

[17]See cases cited *supra* note 9.

[18]Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L.R.A. 369 (1896); Crawley v. Howe, 291 Ill. 107, 125 N.E. 743 (1920); Semmes v. Worthington, 38 Md. 298 (1873); Spencer v. Spencer, 25 R.I. 239, 55 A. 637 (1903).

[1]Miss. Code Ann. (1942) § 657: ". . . and, moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two or more credible witnesses in the presence of the testator or testatrix."

The Mississippi Statute follows the original Wills Act,[2] which required a will to be in writing, and the Statute of Frauds,[3] which required the will to be signed by the testator or someone in his presence at his direction. Under these statutes the leading English case of *Lemayne v. Stanley*[4] held that when the testator wrote his own will which began, "I, John Stanley, make this my last will," the testator's name should be regarded as his signature. Subsequently, the Act of Victoria[5] required a will to be signed "at the foot or end thereof." While the Mississippi Statute does not require a will to be signed at the end thereof,[6] as does the Act of Victoria, the court in the principal case has interpreted the word "subscribe," in the case of a holographic will, to mean sign at the end of the will. This interpretation of the word "subscribe" is generally followed.[7]

This decision immediately raises the question, what is the end of a will? This point has not yet been decided in Mississippi. In the twelve states[8] requiring a will to be signed at the end numerous cases have been decided on the question.

One line of decisions[9] strictly construe the wording of the statute on the grounds that the making of a will is a statutory privilege and the intention of the legislature is controlling. In a New York case[10] the instrument was drawn on a printed form consisting of four pages. Testator signed in the provided space on the third sheet and continued the dispositive clauses on the fourth sheet. The court held that his signature was not a valid subscription in that the signature was not at the physical end of the will.

Another line of decisions[11] hold that the end of the will is the logical end of the disposing portion as determined by sense rather than by space. In a Pennsylvania case[12] the will was written on a single sheet of paper folded in the middle along the short dimension, making four pages of equal size. The first and third

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[2] 32 HENRY VIII, c. 1 (1540).

[3] 29 CHARLES II, c. 3, § 5 (1677).

[4] 3 Lev. 1 (1681).

[5] 7 WILLIAM IV & 1 VICTORIA, c. 26, §§ 9, 13 (1837).

[6] Better v. Hirsh, 115 Miss. 614, 76 So. 555 (1917); Armstrong v. Walton, 105 Miss. 337, 62 So. 173, 46 L.R.A.(N.S.) 552, Ann. Cas. 1916E 137 (1913).

[7] See 1 ALEXANDER, COMMENTARIES ON WILLS (1917) § 419; 1 PAGE, WILLS (1928) § 288.

[8] Arkansas, California, Idaho, Kansas, Montana, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah. See 1 ALEXANDER, COMMENTARIES ON WILLS (1917) § 416.

[9] *In re* Tyner's Will, 134 Misc. 154, 245 N.Y.S. 711 (1930); *In re* Reilly's Will, 129 Misc. 77, 220 N.Y.S. 781 (1927); *In re* Faye's Will, 97 Misc. 532, 163 N.Y.S. 408 (1916); *In re* Diehl's Will, 112 N.Y.S. 717 (1908); *In re* Andrews' Will, 162 N.Y. 1, 56 N.E. 529 (1900); Sisters of Charity v. Kelly, 67 N.Y. 409 (1876); Glancy v. Glancy, 17 Ohio St. 135 (1866); *In re* Brown's Estate, 347 Pa. 244, 32 A.(2d) 22 (1943); Hays v. Harden, 6 Pa. 409 (1847); *In re* Alexander's Estate, 104 Utah 286, 139 P.(2d) 432 (1944).

[10] *In re* O'Neil's Will, 91 N.Y. 522 (1883).

[11] Chase v. Union Title Insurance and Trust Company, 51 Cal.App.(2d) 353, 124 P.(2d) 895 (1942); *In re* Hieldreth's Will, 36 N.Y.S.(2d) 938 (1943); *In re* Golden's Will, 165 Misc. 205, 300 N.Y.S. 737 (1938); *In re* Murphy's Estate, 160 Misc. 353, 289 N.Y.S. 952 (1936); *In re* Field's Will, 204 N.Y. 448, 97 N.E. 881, 39 L.R.A.(N.S.) 1060, Ann. Cas. 1913C 842 (1912); *In re* Foley's Will, 76 Misc. 168, 136 N.Y.S. 993 (1912); *In re* Coyne's Estate, 349 Pa. 331, 37 A.(2d) 509 (1944); *In re* Stinson's Estate, 228 Pa.St. 475, 77 A. 807, 139 Am.St.Rep. 1014, 30 L.R.A.(N.S.) 1173 (1910); *In re* Swire's Estate, 225 Pa. 188, 73 A. 1110 (1909); Baker's Appeal, 107 Pa. 381, 52 Am.Rep. 478 (1884).

[12] *In re* Stinson's Estate, 228 Pa.St. 475, 77 A. 807 (1910).

pages were filled in and the signature appeared about the middle of the second page. The court held that the end of a will is the logical end of the testatrix's disposition of her property wherever it appears on the paper and not the point spatially farthest removed from the beginning.[13]

The diversity of decisions in the different jurisdictions and within the same jurisdiction show that no satisfactory test has been devised to determine the "end" of a will.

The evident purpose of the statute in requiring a will to be signed "at the end thereof" is to prevent fraudulent additions to the will by showing the termination of the testamentary act. The legislature does not prescribe the form of the dispositive clauses but does prescribe the form of execution.[14] The strict construction which has been placed on the requirement that a will be signed at the end thereof has operated to invalidate so many wills whose genuineness has not been questioned[15] that it has been said that "the remedy has proved in practice far worse than the disease."[16]

In deciding what is the end of a will it would seem that the Mississippi Supreme Court would necessarily follow one of the two lines of thought mentioned but as yet there is no indication as to what the decision of the court would be.

—*Robert H. McFarland*

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[13]77 A. at 809.

[14]Matter of Seaman's Estate, 146 Cal. 455, 80 P. 700, 703 (1905).

[15]See 1 PAGE, WILLS (1928) § 276.

[16]*In re* Andrews' Will, 60 N.Y.S. 141, 147 (1899), *aff'd*, 162 N.Y. 1, 56 N.E. 529 (1900).

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